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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1149.

THE UNITED STATES EX REL. SYLVANUS C. BOYNTON, PLAINTIFF IN ERROR,

vs.

JAMES G. BLAINE, SECRETARY OF STATE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 8, 1890.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Petition for mandamus	1	1
Order to show cause	23	8
Order to show cause and proof of service of same	24	9
Appearance for respondent	25	9
Order enlarging time to answer	26	10
Answer	28	10
Order denying mandamus and dismissing petition	42	15
Order allowing writ of error	43	16
Bond	44	16
Writ of error	46	17
Citation and proof of service of same	47	17
Certificate to record	48	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 9, 1891.

1 In the Supreme Court of the District of Columbia.

Petition & Affidavit for Mandamus. Filed Nov. 23, 1889.

THE UNITED STATES *ex Relatione* SYLVANUS C. BOYNTON, Petitioner,
vs.
JAMES G. BLAINE, Secretary of State.
} No. 30137, Law.

To the hon. the justices of the supreme court of the District of Columbia:

Sylvanus C. Boynton, of the city, county, and State of New York, a citizen of the United States, respectfully petitions and informs the court as follows:

First. That on the 4th day of July, A. D. 1868, a treaty was duly concluded and made between the United States and the Republic of Mexico, whereby it was agreed that all claims of citizens of either country upon the government of the other theretofore arisen and then remaining unsettled should be referred for final adjudication to an international tribunal of arbitration, to consist of two commissioners, and in case of their disagreement on any claim to an umpire.

Second. That the said treaty of July 4th, 1868, contained,
2 among other provisions, the following clause:

"The President of the United States and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided by them or him, and to give full effect to such decisions without any objection, evasion, or delay whatsoever. * * * The high contracting parties agree to consider the proceedings of the commissioners as a full, perfect, and final settlement of every claim upon either government arising out of any transaction of a date prior to the exchange of ratifications of this convention, and further engage that every such claim, whether or not the same may have been presented to the notice of or made, preferred, or laid before the said commission, shall, from and after the proceedings of the said commission, be considered and treated as finally settled, barred, and henceforth inadmissable."

Third. That it was stipulated in the treaty aforesaid that if
3 the aggregate of all the claims allowed on the one side should exceed the aggregate of all the claims allowed on the other side the balance should be paid by the government against whom it so resulted in equal annual instalments until the whole balance had been paid, and the government so receiving such balance undertook to make distribution and payment *pro rata* to the claimants in whose favor awards had been made; that the aggregate of the findings and awards made and reported to the State Department against Mexico and in favor of citizens of the United States largely

exceeded the aggregate of the findings and awards made and reported against the United States and in favor of citizens of Mexico.

Fourth. That the total amount of the awards rendered by the commission in favor of citizens of the United States was $4,125,622.20. The total amount of the awards in favor of citizens of Mexico was $150,498.41, thus leaving a balance to be paid over by Mexico to the United States, according to the stipulation in the treaty, of $3,975,123.70. Of this sum $313,531.78 was payable in United States currency, $416,065.31 in United States gold, and $3,245,526.61 in Mexican gold, and the total amount of the balance due
4 from Mexico was payable in annual instalments of $300,000 each, composed proportionately of the said several currencies. Subsequently, in order to avoid the inconvenience of receiving Mexican gold or fluctuating values of its equivalent, a protocol was signed at the Department of State by the Secretary of State and a special agent of Mexico on the 31st of January, 1878, whereby it was determined and agreed that the Mexican dollar should be taken as equivalent to $0.983,939 United States gold, and that the awards payable in Mexican gold should be paid at this rate in United States gold. At this rate the value of the awards payable in Mexican gold, as above stated, was $3,193,400.25, and this, added to the sums above stated as originally payable in United States currency and United States gold, made the total amount payable by Mexico in United States gold and currency $3,922,997.43. Deducting from this sum an amount overpaid by Mexico on account of the expenses of the commission, the amount actually paya-
5 ble by her in United States currency and gold was $3,865,498.42. No reservation was made in the said protocol whereby Mexico could claim that any of the awards were not to be governed by the finality clause in the treaty of July 4, 1868, but the amount in each case payable by Mexico was by the effect of the said protocol reduced into United States gold and currency, including in the computation all the awards made in favor of the citizens of United States, in order to make it certain in what money Mexico was to pay and the State Department was to receive the stipulated payments.

Fifth. That since the signing of the protocol aforesaid and down to and including the instalment due January 31, 1889, Mexico has paid into the Department of State $3,790,359.66. There remains due in 1890 a final instalment of $74,138.76. Of the total amount received from Mexico down to and including the last instalment paid there remains undistributed in the State Department
6 a balance of $586,267.15, paid by Mexico on the awards in favor of Benjamin Weil and La Abra Silver Mining Company, and of this amount the sum of $416,145.40 is the amount originally distributable to Benjamin Weil, his representatives or assigns, on his award hereinafter particularly mentioned. To this last-mentioned amount there should be added a proportionate part of the last instalment paid by Mexico on account of the said two awards.

Sixth. That the commissioners appointed under the treaty of July 4, 1868, met in the city of Washington and were engaged in the

hearing and adjudication of claims of citizens of each of the two countries of the government of the other for several years; and among the claims presented by the Government of the United States on behalf of citizens of the United States was one preferred by Benjamin Weil, a citizen of the United States, for an unjust and unlawful seizure and appropriation of personal property of the said
7 Weil by the government of Mexico or some of her authorities. On this claim the commissioners failed to agree, and according to the provisions of the treaty it was referred to the umpire to make the final and conclusive adjudication thereon.

Seventh. That a great amount of evidence in support of and against the claim of the said Weil, such as the treaty aforesaid allowed and called for, was taken and submitted to the commissioners, and on their disagreement was referred to the umpire, who heard and decided the case on the proof so submitted; and the claim was in hearing and adjudication before the said commission and the umpire for the space of about six years, prosecuted by counsel for the United States, representing the interests of the claimant, and defended against by counsel for Mexico; and one of the issues involved in the hearing and passed upon finally by the umpire was whether the said Benjamin Weil had in his own right a lawful and honest title to the personal property for the unlawful and
8 unjust seizure and appropriation of which he claimed damages, and what damages he was entitled to recover, on which issues Mexico was fully heard by counsel.

Eighth. That on the first of October, 1875, the umpire, the Rt. Hon. Sir Edward Thornton, then British minister to the United States, on the proofs submitted to him according to the provisions of the treaty aforesaid, made an award in favor of the said Benjamin Weil for the total sum of $487,810.68, in which sum was included interest for a certain period; and the said award, together with all the other findings and proceedings of the commission, was duly reported to and filed in the State Department, and thereupon the said award became final and conclusive under the clause of the treaty hereinbefore recited.

Ninth. That on the fifth day of November, 1875, one month and four days after the award in favor of Benjamin Weil was made by the umpire as aforesaid, an instrument in writing was executed under their hands and seals by all persons then having an interest
9 in or title to the said award, and by your petitioner, Sylvanus C. Boynton, under his hand and seal, which instrument was soon after its execution filed in the State Department and is now remaining there; and in and by the said instrument there was duly assigned to this petitioner the sum of fifty-nine thousand five hundred and sixty-one dollars, part of the award made in favor of the said Benjamin Weil, and it was stipulated and agreed that this petitioner should have, and there was accorded to him, a lien on the said award to the amount aforesaid.

Tenth. That, acting on and in due execution of the treaty aforesaid, and recognizing the rights of this petitioner under the abovementioned instrument and his lien upon the said award, the Secre-

tary of State distributed and paid to him on the 16th day August, 1880, the sum of $17,715.26, and on the 8th day of March, 1881, the further sum of $4,512.10, amounting together — the sum of $22,227.36,
10 which two sums were distributed and paid to this petitioner out of the moneys remaining in the State Department and applicable under the provisions of the treaty to the aforesaid award made in favor of Benjamin Weil, leaving a balance due to your petitioner from the undistributed and unpaid instalments paid by Mexico on account of and to satisfy the said award of $37,333.64.

Eleventh. That on the 13th of July, 1882, on a complaint made to the President of the United States by Mexico that the award so made in favor of Benjamin Weil was made on a false and fraudulent claim and on proofs which imposed on and misled the umpire by forged documents, perjury, and other false representations, the President of the United States negotiated and signed a convention with the President of Mexico, containing among other provisions, the following clauses:

(After a preamble:)

"The President of the United States, after considering the circumstances of the case, and in view of the statute hereinbefore made (June 18, 1878), being of opinion that the cases of Benjamin Weil and La Abra Silver Mining Company should each be reopened
11 and retried, the President of the United States of America and the President of the United States — Mexico have resolved to conclude a convention for that purpose. * * * The findings of the commission on said claims of Benjamin Weil and La Abra Silver Mining Company, numbered 447 & 489 on the American docket of the commission under the convention of July 4, 1868, between the high contracting parties, are hereby set aside as to instalments not paid by Mexico before January 31, 1882, and it is agreed that there may be a reopening of each of these cases in the manner provided as to the remainder of said claims paid or yet remaining unpaid on the 31st of January, 1882. * * * The rehearing refers only to the instalment which was paid on the 31st of January last and to those instalments which may be hereafter paid. Mexico charges that the said claims as presented before the commission were whol-y based upon fraud." * * *

Twelfth. That on the 26th day of July, 1882, the President of the United States, by special message, submitted the said convention
12 of July 13th, 1882, to the Senate of the United States for its constitutional assent and concurrence, together with the proofs adduced by Mexico which had led him, the President of the United States, to sign the convention aforesaid and by which Mexico claimed to show the fraudulent character of the said award. The said convention was under consideration in the Senate for nearly four years, and was repeatedly taken up and debated in executive sessions from time to time, together with the proofs so submitted by the President of the United States, and the said convention was finally acted on by a vote of the Senate on the 21st day of April, 1886.

Thirteenth. That, while the said convention of July 13th, 1882,

was pending in the Senate for its constitutional assent and concurrence as a co-ordinate branch of the treaty-making power of the United States, John J. Key, an assignee of a portion of the award made in favor of the said Weil, instituted a proceeding in this honorable court to obtain a writ of mandamus to be issued to the Secretary of State and ordering him to pay to the said Key the
13 amount of the distributive share of the moneys then lying in the State Department to which he, the said Key, was entitled as assignee of the said Weil; and thereupon such proceedings were had in this honorable court that a peremptory mandamus, as prayed for by the said Key, after due hearing and argument for and against the prayer of the said Key's petition, was issued and served on the Secretary of State, and the Secretary of State appealed from the decision of this honorable court to the Supreme Court of the United States, and the said appeal was duly entered and heard in the said last-mentioned court, and the decision of the court was pronounced by Mr. Chief Justice Waite in an opinion delivered at the October term, in the year 1883 (to wit, on the 12th day of January, 1884), reversing the decision of this honorable court and denying the mandamus, as will appear by reference to the case of Frelinghuysen, Secretary of State, *vs.* Key, reported vol. 110, U. S. Reports, page 63.

Fourteenth. That in and by the opinion of Mr. Chief Justice Waite it appears that the Supreme Court of the United States held, notwithstanding the finality clause of the treaty of July 4th, 1868, that it was competant *to* the President of the United States
14 to negotiate and sign the convention of July 13th, 1882, with the President of Mexico and to submit the same to the Senate of the United States for its constitutional assent and concurrence, and that while the two governments were thus negotiating the court would not interfere by mandamus, and that while the said convention was so pending the President of the United States could withhold payment from him, said Weil, or his representatives or assigns. Of this decision and determination of the Supreme Court of the United States, made before the final action of the Senate of the United States on the said convention of July 13th, 1882, the Senate of the United — had notice, and also had notice of all the grounds and reasoning on which the court had reached its conclusions, and after due consideration and full deliberation the Senate of the United States, by a final vote taken on the 21st day of April, 1886, refused to assent to and concur in the said convention of July 13th, 1882, less than two-thirds of the Senators present voting in favor thereof and a quorum of the Senators being present; thereupon it ap-
15 peared and became certain, under article II, sec. 2, of the Constitution of the United States, that the Senate, a co-ordinate branch of the treaty-making power, held that there was no sufficient ground, reason, or cause for excepting the said award made in favor of the said Weil from the operation of the finality clause of the treaty of July 4th, 1868, or for repealing or rendering that clause inoperative as to the said award, and of this decision and conclusion of the Senate of the United States the President of the United States and the Secretary of State and the government of Mexico had notice.

Fifteenth. That, notwithstanding the proceedings above mentioned, including the decision and conclusion of the Senate of the United States, on the complaint made by Mexico, that the claim of the said Weil was wholly based upon fraud, thereby refusing the concurrence of the Senate in the convention of July 13th, 1882, the Secretary of State of the United States, although repeatedly requested, has neglected and refused and still neglects and refuses to make distribution and payment to the said Weil and his
16 representatives or assigns of their distributive shares of the moneys now lying in the State Department and due to him or them as aforesaid, and more especially, as hereinafter stated, the Secretary of State has expressly refused to pay to this petitioner the amount of the balance claimed by him as above set forth.

Sixteenth. That on the 20th day of November, 1889, this petitioner, by his attorney herein, made in writing at the Department of State a demand on the Secretary of State to pay to this petitioner the sum of $37,333.64, due to this petitioner as aforesaid, by presenting to the said Secretary, the Hon. James G. Blaine, and by leaving with him an original letter, of which the following is a copy:

WASHINGTON, D. C., *November 20th*, 1889.

To the Honorable James G. Blaine, Secretary of State.

SIR: I hereby demand of you payment of the sum of thirty-
17 seven thousand three hundred and thirty-three dollars sixty-four cents ($37,333.64), part of the sum of fifty-nine thousand five hundred and sixty-one dollars ($59,561.00) heretofore assigned to me by an instrument in writing executed under seal by all parties having at the date thereof any interest in or title to the award made in favor of Benjamin Weil against the Republic of Mexico under the treaty of July 4, 1868, between the United States and Mexico, the said instrument and assignment being dated November 5th, 1875, and is on file in your Department.

The total sum assigned to me as aforesaid out of the whole amount of the said award was, as above stated, fifty-nine thousand five hundred and sixty-one dollars ($59,561.00); of this amount I have heretofore received from the Department the sum of twenty-two thousand two hundred and twenty-seven dollars thirty-six cents ($22,227.36), making the balance due to me and now remaining unpaid the sum of thirty-seven thousand three hundred and thirty-three dollars sixty-four cents ($37,333.64), as above claimed.

18 This demand is made for payment out of moneys now lying in the State Department paid into the Department by Mexico to meet and satisfy the said award in favor of Benjamin Weil, and now remaining undistributed and unpaid to the said Weil or his legal representatives or assigns, the said instrument of assignment having given me a lien on the said award to the extent of the sum so assigned as aforesaid.

I am, sir, very respectfully, your obedient servant,

SYLVANUS C. BOYNTON,
By his attorney, GEORGE TICHNER CURTIS.

To which demand of this petitioner the Secretary of State made the following answer:

DEPARTMENT OF STATE,
WASHINGTON, *Nov.* 20, 1889.

George Tichner Curtis, Esq., The Arlington, Washington, D. C.

19 SIR: I have to acknowledge the receipt of your letter of the 20th instant, in which, as attorney for Sylvanus C. Boynton, you demand the payment of the sum of thirty-seven thousand three hundred and thirty-three dollars sixty-four cents ($37,333.64), alleged to be due to him out of moneys paid by the government of Mexico and lying undistributed in this Department on account of the award of the late Mexican claims commission in the case of Benjamin Weil.

In reply I have to inform you that for causes deemed lawful and sufficient I am unable to comply with your demand.

I am, sir, your obedient servant,

JAMES G. BLAINE.

Seventeenth. And this petitioner avers, as matter of law, that the moneys so paid into the Department of State by Mexico to meet and satisfy the aforesaid award in favor of Benjamin Weil were paid by Mexico and received by the Department of State, not as moneys belonging to the United States or in which the United States
20 had or could have any proprietary interest or property, but in trust to distribute and pay the same to the said Benjamin Weil or his legal representatives or assigns in satisfaction of his, the said Weil's, original claim against Mexico, as the same had been found and finally adjudicated by the umpire aforesaid under the treaty of July 4th, 1868.

Thereupon your petitioner prays this honorable court to issue a notice and summons directed to the Hon. James G. Blaine, Secretary of State of the United States, directing him to appear and answer this petition at such time as this honorable court may think proper, and also, after due hearing in the premises, to grant to this petitioner a peremptory writ of mandamus, commanding the said Secretary to distribute and pay to this complainant the sum of $37,333.64, which this petitioner is by law entitled to receive.

SYLVANUS C. BOYNTON.

GEO. TICHNER CURTIS,
Attorney and of Counsel for the Relator.

CITY, COUNTY, AND STATE OF NEW YORK:

21 On this twenty-second day of November, A. D. 1889, personally appeared before me, a notary public in and for the said county, Sylvanus C. Boynton, to me personally known, and in my presence signed the foregoing petition and made oath that the matters and things therein stated as of his own knowledge and belief are true, and that in all other matters and things he believes the same to be true.

E. D. PAXSON,
[SEAL.] *Notary Public* (76), *N. Y. Co.*

Form 1.

STATE OF NEW YORK,
City and County of New York, } ss:

I, Edward F. Reilly, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that E. D. Paxson, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof or acknowledgment a notary public in and for the city and county of New York, dwelling in
22 the said city, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 22d day of Nov., 1889.

[SEAL.] EDWARD F. REILLY, *Clerk.*

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a circuit court and special term in and for said District, commencing the third Monday, it being the 21st day, of October, A. D. 1889.

MONDAY, *October* 21, *A. D.* 1889.

By order of Martin V. Montgomery, justice, one of the
23 justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

SATURDAY, *November* 23*d*, *A. D.* 1889.

Session resumed pursuant to adjournment, Justice Montgomery presiding.

* * * * * * *

On reading and filing the petition, duly verified, of the relator, and on hearing George Tichner Curtis, Esq., for said relator, it is ordered that said respondent do, on the third day of December next, at the opening of court on that day, show cause to the supreme court of the District of Columbia, in general term, why the prayer of said petition shall not be granted and the order thus prayed for shall not be made; and it is further ordered that a certified copy of this order and a copy of said petition be served on said respondent on or before the 26th instant.

M. V. MONTGOMERY, *Justice.*

24 *Rule to Show Cause. Dated Nov. 23d, 1889.*

In the Supreme Court of the District of Columbia, Holding a Circuit Court.

THE UNITED STATES *ex Rel.* S. C. BOYNTON
vs.
JAMES G. BLAINE, Secretary of State of the United States. } At Law. No. 30137.

On reading and filing the petition, duly verified, of the relator, and on hearing George Tichner Curtis, Esq., for said relator, it is ordered that said respondent do, on the third day of December next, at the opening of court on that day, show cause to the supreme court of the District of Columbia, in general term, why the prayer of said petitioner shall not be granted and the order therein prayed for shall not be made; and it is further ordered that a certified copy of this order and a copy of said petition be served on said respondent on or before the 26th instant.

M. V. MONTGOMERY, *Justice.*

25 *Marshal's Return.*

Served copy of the within order and also copy of the petition in this cause on James G. Blaine, Secretary of State of the United States, this 25th day of November, 1889.

D. M. RANSDELL, *Marshal.*

Order for Appearance for Defendant. Filed Dec. 4, 1889.

In the Supreme Court of the District of Columbia, the 4th Day of Dec'r, 1889.

U. S. *ex Rel.* BOYNTON
vs.
BLAINE. } At Law. No. 30137.

The clerk of said court will please enter my appearance for the respondent herein.

WM. A. MAURY,
Asst. Att'y Gen'l & Counsel for Respondent.

26 *Court Proceedings.*

MONDAY, *October 7th,* 1889.

Proceedings before the supreme court of the District of Columbia, sitting in general term, being first Monday, October 7th, 1889.

Present: Presiding Chief Justice Bingham and justices.

* * * * * * *

WEDNESDAY, *December* 4, 1889.

Session resumed pursuant to adjournment.

Justices Hagner and James; chief justice absent, holding criminal court.

* * * * * * *

THE UNITED STATES *ex Rel.* BOYNTON
vs.
JAMES G. BLAINE.
} At Law. No. 30137.

On motion of William A. Maury, Esq., attorney for the respondent, it is by the court, this 4th day of December, A. D. 1889,
27 ordered that the time limited for answering the rule to show cause heretofore issued herein be, and the same hereby is, enlarged to the 17th instant.

For the court:

CHARLES P. JAMES, *J.*

28 *Answer of James G. Blaine to Rule to Show Cause. Filed Dec.* 17, 1889.

In the Supreme Court of the District of Columbia, Sitting in General Term.

THE UNITED STATES *ex Relatione* SYLVANUS C. BOYNTON
vs.
JAMES G. BLAINE, Secretary of State of the United States.
} At Law. No. 30137.

The answer of James G. Blaine, Secretary of State of the United States, to the rule on him laid by this honorable court at the suit of the United States on the relation of Sylvanus C. Boynton to show cause why the writ of mandamus should not issue against him, the said James G. Blaine, Secretary of State, according to the prayer of the petition filed in the said court by the said Sylvanus C. Boynton.

This respondent, saving and reserving to himself all benefit
29 of exception to the jurisdiction of this honorable court in the premises, nevertheless, in answer to the said relator's petition, answering, saith—

That true it is that on July 4, 1868, a treaty was concluded between the United States and the Republic of Mexico "for the adjustment of the claims of citizens of either country against the other."

That in obedience to the terms of the said treaty a commissioner was appointed by each of the high contracting parties to hear and determine the said claims, and that the commissioners so appointed agreed upon an umpire to be called to their assistance in case of disagreement between them.

That among the claims brought before the said commissioners for

determination was a claim of Benjamin Weil against the Republic of Mexico.

That, the said commissioners being divided in opinion on the said claim, the said umpire was called in, and thereupon the sum of $487,810.68, in Mexican gold, was awarded as the amount due by the Republic of Mexico on the said claim; the equivalent of
30 which, in United States gold, according to an agreement supplemental to the said treaty between the United States and the Republic of Mexico, is $479,975.95, the payment of which amount in United States gold by the Republic of Mexico will be a full payment of the award on the claim of the said Weil.

That the amount paid by the Republic of Mexico on account of the award in favor of the said Weil is $416.145.40, of which said amount the sum of $171,889.64, being the first five instalments paid by the Republic of Mexico, has been paid by the United States to the parties authorized to receive payment of the same.

But this respondent, further answering, saith that the whole of the said amount of $487,801.68 in Mexican gold awarded on the claim of the said Weil, or the equivalent amount of $479,975.95 in United States gold, would not be distributable to the parties claiming the said award if wholly paid and demandable, for that the said amount is subject to the deduction of the ratable charge made against the total amount of each of the awards to defray the expenses of the said commission, and that the amount of said
31 charge on the sum awarded on the claim of the said Weil was $20,323.50, which being deducted from the said sum leaves the sum of $459,652.45, to which is to be added the sum of $70.96, being the ratable amount of a sum appropriated by Congress to make up a deficiency caused by the deduction of the whole amount of the awards against the United States from the whole amount of the awards against the Republic of Mexico, as required by article IV of the said treaty and by certain complications arising from that mode of settlement; and this respondent avers that the net amount of the sums paid and to be paid by the Republic of Mexico on the said award will be $459,723.41, and that the net amount of the sums which have been already paid by the Republic of Mexico on said award is the sum of $450,985.96, and that the net amount of what remains to be paid by the said government on the said award is $8,737.45; and this respondent saith that, deducting the amount of $171,889.64, paid as aforesaid by the United States to parties authorized to receive payment of the said sum, from the said net
32 amount of $450,985.96, there remains now in the hands of the United States on account of said award the net sum of $279,096.32.

And this respondent, further answering, saith that the amount paid to the said relator, Sylvanus C. Boynton, as assignee of part of the said award is $22,227.36, and that if the President of the United States, in whose control is the said undistributed balance, should determine that it is not inconsistent with the public interests to pay the same or so much thereof as would be ratably payable to the said Boynton there would be to be paid to the said Boynton the sum of

$36,201.63 and not the sum of $37.333.64, as is erroneously averred in the said petition. But this respondent saith that the President of the United States has forbidden the payment of any part of the said net balance on the ground hereinafter stated, and that for that reason no scheme of distribution of the said net balance has been made; and this respondent saith that it would seem to be improvident to state absolutely at this time what amount of the said
33 net balance would be to be paid to the said Boynton in the event that the President of the United States should hereafter be of opinion that payment of a ratable part of the said net balance should be made to the said Boynton, as assignee of the said Weil.

And this respondent, further answering, saith that he is advised that the right to demand payment of any part of the said money set up by the relator in the said petition is inconsistent with the legal relation of the Government of the United States to the money paid by the Republic of Mexico on account of the sum awarded on the claim of said Weil; that to enable the Government of the United States to make the said claim the subject of an international demand against the Republic of Mexico it was necessary that the said claim should pass entirely beyond the control of Benjamin Weil, the owner, and become subject to the control and authority of the United States and be held and treated as a claim of the United States against the Republic of Mexico, to be paid or satisfied in any manner that might be agreed on by the two governments or to be released
34 to the Republic of Mexico without satisfaction of any kind if it should be deemed best for the interests of the United States.

And this respondent, further answering, saith, as a consequence of what is averred next hereinbefore, that the money paid as aforesaid by the Republic of Mexico in satisfaction of the awards of the said commission became, upon the receipt thereof by the United States, the money of the United States and not in any way subject to the demand or control of the original claimants; that said claimants were not recognized by the said commission; that the only parties who appeared before the said commission were the governments of the United States and the Republic of Mexico, and that each of said governments was represented by one person, in virtue of the following provision of article III of the said treaty, namely:

It shall be competent for each government to name one person to attend the commissioners as agent on its behalf, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

And this respondent saith that this language of the treaty shows that the high contracting parties regarded the claims urged by each government as the claims of such government.

35 And this respondent, further answering, saith that he is advised that the allegation in the third paragraph of the petition, which seems to imply that the United States is under some obligation imposed by the treaty "to make distribution and payment

pro rata to the claimants in whose favor awards had been made," is not founded on any provision of the said treaty.

And this respondent, further answering, saith that the United States is thus invested with the entire control of said claims to enable it to discharge any international duty that may attach thereto or to any part thereof, and that if the President of the United States has probable cause to think that good faith towards the Republic of Mexico and a proper regard for the honor of the United States require that any part of the money so paid by the Republic of Mexico should be withheld from distribution this respondent is advised that it is the duty of the President to withhold payment of the same until a proper investigation can be had; and this respondent, answering, saith that so it is that grave charges and representa-
36 tions impeaching the integrity of the evidence on which the award in the case of said Weil was made have been brought to the notice of the Government of the United States in a way to command its earnest attention, and that it is the desire of the President to have the said charges and representations investigated so soon as the Congress shall have provided the means for doing so.

And this respondent, further answering, saith that during the first session of the Fiftieth Congress—that is to say, on June 20, 1888—the Committee on Foreign Relations of the Senate reported a bill to provide for the desired investigation by investing the supreme court of the District of Columbia with jurisdiction over the subject; and this respondent saith that while the said charges and representations are pending the President of the United States hath concluded that payment of the money now demanded by the relator should be withheld, and this respondent is advised that the course thus taken by the President is in harmony with the wish of Congress as declared in section 5 of the act of June 18, 1878,
37 namely, that it shall be lawful for the President to withhold payment of the said award in the case of Benjamin Weil until such case shall be retried and decided "in such manner as the governments of the United States and Mexico may agree or until Congress shall otherwise direct."

And this respondent, further answering, saith that he is advised that there is no sufficient foundation for the inference drawn by the relator in paragraph 15 of the petition, namely, that the rejection by the Senate of the convention negotiated by the United States and Mexico for the purpose of reopening the awards in the cases of Benjamin Weil and the La Abra Silver Mining Company involved the judgment of the Senate that the charges and representations touching the said awards were unsupported in fact, and, furthermore, that he is advised that there is ground for supposing that the refusal of the Senate to ratify the said convention was the result of a desire that the proposed investigation into the said charges and representations should be made by a tribunal deriving jurisdiction over the subject from a law of the United States, and this
38 respondent saith that this supposed desire would seem to have taken the form of the bill reported as aforesaid by the Senate Committee on Foreign Relations.

And this respondent, further answering, saith that he is advised that there is nothing in the case of Frelinghuysen *v.* Key, referred to by the relator, that is in any way inconsistent with the position taken by the President of the United States with reference to the money claimed by the relator, and that the said case supports the said position.

And this respondent, further answering, saith that it is not true, as stated by the relator, that this respondent holds the money awarded on the claim of said Weil impressed with a trust for the parties claiming to be entitled to the same, for that he holds the said money as the agent of the President of the United States, whose control over the same is complete and who can at any time withdraw the said money from the control of this respondent; wherefore this respondent saith, with great respect, that to hold him accountable as a trustee or to place him under the stress of a mandamus touching the money held by him precariously as aforesaid might be to subject this respondent to a liability for the money which he could only satisfy out of his own private estate.

39

And, furthermore, this respondent saith that it would cause an embarrassing conflict of duty to hold him accountable to private parties for a fund which, if the charges and representations aforesaid should be established, it might be the duty of the United States to return to the Republic of Mexico, for in the language of the Chief Justice in the said case of Frelinghuysen *v.* Key—

The United States, when they assumed the responsibility of presenting the claims of their citizens to Mexico for payment, entered into no contract obligations with the claimants to assume their frauds and to collect on their account all that, by their imposition of false testimony, might be given in the awards of the commission. As between the United States and the claimants, the honesty of the claims is always open to inquiry for the purposes of fair dealing with the government against which, through the United States, a claim has been made.

And now this respondent, in the light of the matters and things hereinbefore averred and set forth, doth, by way of plea to the whole of the relator's petition, say that the same doth relate to a matter which falls exclusively within the powers and competency of the President of the United States and this respondent as subordinate to him and subject to his direction and control, and which doth in nowise fall within the jurisdiction and competency of the judicial department of the Government of the United States, and that it would involve an interference of the said judicial department with a matter which is exclusively committed by the Constitution to its co-ordinate, the executive department, for this honorable court to take cognizance of the matter of the relator's petition.

40

And now this respondent, having fully answered the said petition, prays to be hence dismissed with his proper costs in this behalf most wrongfully sustained.

JAMES G. BLAINE,
Secretary of State of the United States.
WM. A. MAURY,
Assistant Attorney General and of Counsel, etc.

STATE OF NEW YORK, }
County of New York, } ss:

Personally appeared before me, the undersigned, a notary public in and for the State and county aforesaid, James G. Blaine,
41 Secretary of State of the United States, and made oath in due form of law that the matters and things in the aforegoing petition are true in so far as stated on his own knowledge, and that he believes them to be true in so far as stated on the information of others.

Given under my hand and seal this 16th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

[SEAL.] WM. H. CARR,
Notary Public, 19, *County of New York.*

Words "to be true" inserted before the oath was administered.
W. H. C.

(Indorsed:) Supreme court of the District of Columbia, sitting in general term. The United States *ex rel.* S. C. Boynton *vs.* James G. Blaine, Secretary of State. At law. No. 30137. Answer of James G. Blaine to the rule to show cause. The clerk will please file this. Wm. A. Maury, Assistant Attorney General and counsel, etc. Filed December 17, 1889. R. J. Meigs, clerk.

42 *Court Proceedings.*

MONDAY, *January 6th*, 1890.

Proceeding- before the supreme court of the District of Columbia, sitting in general term, being first Monday, January 6th, 1890.

Present, presiding: ——.

* * * * * * *

THURSDAY, *March 13th*, 1890.

Session resumed pursuant to adjournment.

Present, presiding: Justices Hagner, Cox, and James.

* * * * * * *

UNITED STATES *ex Rel.* SYLVANUS C. BOYNTON }
vs. } At Law. No. 30137.
Secretary of State, JAMES G. BLAINE. }

43 This cause came on to be heard and was argued by counsel and considered by the court. It is thereupon this 13th day of March, 1890, by the court adjudged and ordered that the application for a writ of mandamus is refused, and the petition be, and the same is, dismissed.

By the court:

A. B. HAGNER.

Order Allowing Writ of Error to the Supreme Court of the U. S. & Fixing Penalty of Bond. Filed April 5th, 1890.

UNITED STATES *ex Rel.* SYLVANUS C. BOYNTON
vs.
JAMES G. BLAINE, Secretary of State. } At Law. No. 30137.

This case was argued by counsel and submitted to the court, and on the 13th day — March, 1890, by order of the court, the writ of mandamus was refused and the petition of the relator dismissed, and now comes the relator and prays for a writ of error to the
44 Supreme Court of the United States, which is allowed, and the penalty of the bond of the relator is fixed at one hundred dollars.

By the court:

A. B. HAGNER.

Bond. Filed April 7, 1890.

In the Supreme Court of the District of Columbia, the Fifth Day of April, 1890.

U. S. *ex Rel.* S. C. BOYNTON
vs.
JAMES G. BLAINE, Sec'y of State of the United States. } In Error. No. 30137.

Know all men by these presents that we, Sylvanus C. Boynton and Samuel C. Pomeroy, are bound unto the above-named James G. Blaine in the sum of ($100) one hundred dollars, to be paid to the said James G. Blaine, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

45 Sealed with our seals and dated this 5th day of April, 1890.

Whereas the above-named Sylvanus C. Boynton, relator, has prosecuted a writ of error to the Supreme Court of the United States to reverse the decision and judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Sylvanus C. Boynton shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SYLVANUS C. BOYNTON,
By GEO. TICHNER CURTIS, [SEAL.]
His Attorney.
SAMUEL C. POMEROY. [SEAL.]

Sealed and delivered in presence of—
EDW. A. BOWERS.
H. J. MAY.

Approved April 7th, 1890.
By the court: A. B. HAGNER.

46 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between The United States *ex relatione* Sylvanus C. Boynton *vs.* James G. Blaine, Secretary of State, being No. 30137 at law, a manifest error hath happened, to the great damage of the said relator, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 7th day of April, in the year of our Lord 1890, and of the Independence of the United States the one hundred and fourteenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

47 *Citation to the Supreme Court of the United States.*

The United States of America to James G. Blaine, Secretary of State, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The United States *ex rel.* Sylvanus C. Boynton is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety.

E. F. BINGHAM,
Chief Justice.

Service accepted on this 7th day of April, in the year of our Lord one thousand eight hundred and ninety.

WM. A. MAURY,
Att'y for Respondent.

48 AUTHENTICATION OF RECORD.

Clerk's Certificate.

Clerk's office, supreme court of the District of Columbia.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 8th day of April, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 8th day of April, 1890.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 8th day of *Meigs,* 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: District of Columbia supreme court. No. 1149. The United States *ex rel.* Sylvanus C. Boynton, plaintiff in error, *vs.* James G. Blaine, Secretary of State. Filed April 8, 1890.

Office Supreme Court U. S.
FILED,
FEB 19 1891
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES EX RELATIONE SYLVANUS C. BOYNTON, PLAINTIFF IN ERROR,

v.

JAMES G. BLAINE, SECRETARY OF STATE OF THE UNITED STATES.

No. 1,149.

Writ of Error to the Supreme Court of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR.

This was a proceeding before the court below for a mandamus for purposes hereinafter more fully set forth. On the answer of the defendant being filed, argument and submission, the court refused the writ and dismissed the petition, and to this judgment the plaintiff sued out a writ of error.

The pleadings will be sufficiently stated in this brief.

The following are the facts of the case:

Boynton, the relator, petitioned the court below for a

writ of mandamus, to be directed to the Secretary of State, requiring him to pay to the relator a specific sum of money, lying in the department, to which the relator showed title by his petition. His title was not denied by the Secretary, but the Secretary's answer set forth that the President of the United States had forbidden him to make the payment. The court below, after hearing the parties, refused the mandamus, but filed no opinion.

Boynton, the relator, became assignee of a certain part of an award made in favor of Benjamin Weil, a citizen of the United States, against Mexico, by a mixed commission constituted under the treaty of July 4, 1868, between Mexico and the United States. Boynton became such assignee for a valuable consideration, before any charge had been made by Mexico that Weil's award was obtained by fraud and false testimony. The treaty contained a clause making the awards of the commissioners or the umpire final and conclusive; a clause which has been inserted in at least fifteen treaties between the United States and foreign nations through a period of more than ninety years.

The treaty was executed by the appointment of two commissioners and an umpire, by whom a great number of claims of citizens of the two countries on the government of the other were finally adjudicated, including one in favor of Weil. The awards were duly reported to and filed in the State Department, and thereupon, under the provisions of the treaty, Mexico began to pay into the Department the annual instalments of money due on the awards against her. These moneys, as they were paid in, were regularly distributed and paid by the Secretary of State to the parties owning the awards, including Weil and his assignees, until the year 1882. Since then payment and distribution have been refused to Weil and his assignees, on the ground that *Mexico charges* that his award was obtained by fraud and false testimony.

On the 13th of July, 1882, a convention between the United States and Mexico was negotiated and signed by the President of the United States and the President of Mexico, and was subsequently submitted to the Senate of the United States for its consideration and approval. It was pending in the Senate for nearly four years, and was finally rejected on the 22d of April, 1886.

The following are the material clauses in the original Treaty and the proposed new Treaty printed in parallel columns:

TREATY OF JULY 4, 1868, BETWEEN THE UNITED STATES AND MEXICO.

The President of the United States and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, *as absolutely final and conclusive upon each claim decided by them or him, and to give full effect to such decisions, without any objection, evasion, or delay whatsoever.* * * * The High Contracting Parties agree to consider the proceedings of the Commissioners as a full, perfect, and final settlement of every claim upon either government, arising out of any transaction of a date prior to the exchange of ratifications of this convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, or made, preferred, or laid before the said commission, *shall, from and after the proceedings of the said commission, be considered and treated as*

CONVENTION OF JULY 13, 1882, BETWEEN THE UNITED STATES AND MEXICO, AS SUBMITTED TO THE SENATE.

[After a Preamble.]

The President of the United States, after considering the circumstances of the case, and in view of the statute hereinbefore made (June 18, 1878), being of opinion that the cases of Benjamin Weil and La Abra Silver Mining Company should each be reopened and retried, the President of the United States of America and the President of the United States of Mexico have resolved to conclude a convention for that purpose. * * * The findings of the commission on said claims of Benjamin Weil and La Abra Silver Mining Company, numbered 447 and 489 on the American docket of the commission under the convention of July 4, 1868, between the high contracting parties, *are hereby set aside* as to instalments not paid by Mexico before January 31, 1882, and it is agreed that there many be a reopening of each of these cases in the

finally settled, barred, and henceforth inadmissible.

manner provided, as to the remainder of said claims paid or yet remaining unpaid on the 31st of January, 1881. * * * The rehearing refers only to the instalment which was paid on the 31st of January last, and to those instalments which may be hereafter paid. *Mexico charges that the said claims, as presented before the commission, were wholly based upon fraud.*

The manifest incompatibility between the original Treaty and the proposed new Treaty could be reconciled in only one mode. That mode was pointed out by this Court in the following manner:

While the proposed new treaty was pending in the Senate, the case of Frelinghuysen, Secretary of State, *vs.* Key was argued and decided in this Court. Key was assignee of a part of the Weil award; and he had obtained a decision of the Supreme Court of the District of Columbia ordering a mandamus to issue to the Secretary requiring him to pay to Key his distributive share of the money then lying in the hands of the Secretary. This decision was brought up here by writ of error. This Court, after argument, held that it was competent to the President and the Senate to make the proposed new treaty with Mexico, notwithstanding the finality clause in the treaty of July 4, 1868; *and that while such new treaty was pending in the Senate* this Court would not grant a mandamus. (Frelinghuysen *v.* Key, 110 U. S., p. 63.) After this decision had been for some time made and promulgated, the Senate on the 22d of April, 1886, rejected the proposed new treaty.

The present case is, in truth, a supplement to the case of Frelinghuysen *v.* Key. The facts are the same, but the situation is different since the Senate rejected the proposed

new treaty. The opinion of the Court in Frelinghuysen *v.* Key was delivered by the late Mr. Chief-Justice Waite. The Court alone can now determine the precise point of the decision, and discriminate it from the dicta which are scattered through the opinion. Until this is done, the Executive Department, the present relator, and all other parties interested in the awards in question, cannot know how to act.

The proposition to be established for the relator is: *That it was a ministerial act alone which the relator asked the Secretary of State to perform, and that as the Secretary refused to perform it, a mandamus is the appropriate remedy.*

I.

The award made by the international tribunal was, upon the settled principles of international law, final and conclusive upon all questions involved in the merits of Weil's claim against Mexico. His claim was for the value of certain personal property unlawfully and unjustly seized and appropriated by Mexico, or some of her authorities, and his title to the property, and the damages which he was entitled to recover, were litigated for six years before the mixed commission, and were finally decided by the umpire by whom the award was made after the commissioners had disagreed upon his claim.

The judgments and decisions of courts of exclusive and final jurisdiction are not re-examinable elsewhere, when the jurisdiction has not been exceeded. The party against whom the judgment of such a court has been rendered is estopped from setting up fraud in its procurement, unless the charge of fraud extends to and involves the court itself, which in this case has never been pretended.

Upon the doctrine generally of arbitration, whether by individuals or nations, the law is thus stated:

"No contract can be more binding than the mutual contract of two disputants, that the question between them shall be referred to an impartial arbitrator and that his decision shall be final; and it is clear that, supposing the decision to be honestly given to the best of the arbitrator's judgment, the party to whom it is adverse cannot conscientiously resist it, although it proves to be mistaken. Municipal law, in its simplest form, is in fact nothing but the establishment, in a community of human beings, of a permanent system of arbitration; and the basis of all law is therefore the express or implied consent of a certain number of persons to refer all their disputes to a certain arbitrator." (*Phillipps' Jurisp., sec.* 160.)

For the general doctrine, as applied in numerous instances, see 2 Int'l Law Digest (Wharton), sec. 221; 3 *Ib.*, sec. 316.

The most eminent text-writers on international law affirm that the principles which govern the decisions of other courts of exclusive and final jurisdiction also govern those of international courts.

Vattel observes:

"If, then, their sentence be confined within these bounds [the question submitted] the disputants must acquiesce in it. They cannot say that it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred, as such, to the decision of the arbitrators. Before they can proceed to evade such a sentence they should prove by incontestable facts that it was the offspring of corruption or flagrant partiality."

Page 277,6th American Edition.

Professor Twiss says:

"When nations have agreed to refer any question in dispute between them to arbitrators, their good faith is pledged to abide by the decision of the arbitrators, unless the decision should involve clear departure from the terms of the

reference, or should be in conflict with the rules of justice, and therefore incapable of being the subject of a valid international compact, or should be the manifest result of fraud and collusion with one of the parties."

Vol. 2, pp. 7 and 8.

Our own text-writer, Halleck, expresses the same rule in the following terms:

"If the contending parties have agreed to abide by the decision of the referees, they are bound to do so, except in cases where the award is obtained by collusion, or is not confined within the terms of the submission."

Chap. 12, p. 292, sec. 6.

By collusion is meant collusion with the referees.

Secretary Seward, in a note addressed to the Government of Venezuela on the 3d of March, 1869, said:

"International tribunals for the adjudication of private claims are created by governments in no expectation that they are to escape that possible admixture of error which is inseparable from all human institutions. They are resorted to because the governments concerned have either actually experienced or have been forced to anticipate the impracticability of their coming to an agreement upon the merits of such claims and upon the methods of investigating them. However imperfect the experiment may prove, it is adopted in view of the dread alternative in comparison with which a practical failure to accomplish exact justice falls into insignificance. First among the great powers to introduce this beneficent mode of achieving the peaceful termination of international controversies, it is not for the United States to do or suffer aught that can impair its efficiency. The deliberations and judgments of a Commissioner would be fruitless if they only started questions for renewed discussion. They must be final or they must be nothing." (See Ex. Doc. 66, 44th Cong., 1st session. See also H. R. Doc. 787, 44th Cong., 1st session.)

Secretary Evarts, who thought that we had grave reason to complain of the "Halifax award," by which two of the Commissioners awarded to Great Britain $5,500,000 in gold, as damages for invasion of her fishery rights, while the American Commissioner found that nothing was due, submitted to the British Government an argument of great force, alleging certain objections to this award, one of which was its "extravagance." The Marquis of Salisbury, British Foreign Secretary, in a dispatch dated November 7, 1878, answered Mr. Evarts that the peace of the world demanded that such adjudications should be final; that the tribunal had fairly heard and considered the whole case, and that the litigants could not dispute the decision. "To argue," he said, "against the validity of the award solely on the ground that the conclusion arrived at by the arbitrators is erroneous, is in effect the same thing as to dispute the judgment which they have formed on the evidence." Mr. Evarts, on mature and deliberate consideration, yielded the point, and our Minister at London, on the 21st of November, 1878, was instructed to give notice that the award would be paid. This instruction was conveyed in the following language:

"I am instructed by the President to say that such payment is made on the ground that the Government of the United States desires to place the maintenance of good faith and the security and value of arbitrations between nations above all question, in its relations with her Britannic Majesty's Government, as with all other governments."

Secretary Frelinghuysen, in a letter addressed to the President in relation to the Venezuelan awards, was equally emphatic, and he made the true distinction between the grounds of objection. He said:

"An examination of the charges formulated by Venezu-

ela against the remaining seven awards shows that they are objected to for various reasons; as, for instance, that the party agreed that his claim was not to be the subject of an international reclamation; that the contracts were not made by the lawful Government of Venezuela; that there was NO JUST FOUNDATION FOR THE CLAIM; THAT THE CLAIMS WERE GROSSLY EXAGGERATED; that the claimant had not exhausted all his remedies in the local courts, &c. *As all such defenses were open to Venezuela in the Commission*, THE TIME FOR ADVANCING THEM HAS NOW PASSED. But the allegation that the Commissioner or the umpire was induced to make these awards by corrupt combination with the claimants or their agents is quite a different matter. The honor of the United States calls for an investigation of *this charge*, and the claimants have no rights in the finality of an award which stands in the way of *such* an inquiry."

In Comegys *v.* Vasse (1 Pet. 193), Mr. Justice Story, speaking for the Supreme Court, said:

"This decision (the award of the Commissioners in favor of a citizen against Spain under a treaty), within the scope of their authority, is *conclusive and final*. If they pronounce the claim valid or invalid, if they ascertain the *amount*, their award in the premises is NOT RE-EXAMINABLE. The parties *must* abide by it as the DECREE OF A COMPETENT TRIBUNAL OF EXCLUSIVE JURISDICTION; and a rejected claim could not again be brought under review in *any* judicial tribunal; and the AMOUNT ONCE FIXED IS A FINAL ASCERTAINMENT OF THE DAMAGES OR INJURY."

With the same force the Supreme Court of the United States has since acted on the principle that the final judgment of a tribunal of competent jurisdiction cannot be impeached in another judicial tribunal by showing that there was perjury and fraud in the testimony adduced on the trial. See the opinion of Mr. Justice Miller in The United States *v.* Throckmorton (98 U. S. R. 61), in which he said:

"Where the same matter has been actually tried, *or was so in issue that it might have been tried*, it is not again admissible; the party is estopped to set up the fraud, because the judgment is the highest evidence *and cannot* be contradicted. * * * We think that the acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds *extrinsic* or *collateral* to the matter tried by the first Court, and not a fraud in the matter on which the decree was rendered.

"The cases where such relief has been granted are those in which by fraud or deception practised on the unsuccessful party he has been prevented from exhibiting his case, by reason of which there has never been a real contest before the Court of the subject-matter of the suit."

These authorities are cited to the point that there can be no *judicial* re-examination of a decision of a competent court of exclusive jurisdiction, on the ground of fraud and perjury in procuring it. The later doctrine of the Supreme Court, in *Frelinghuysen* v. *Key* (110 U. S. R. 63), is entirely consistent with this. It is, that where an award has been made under a treaty between the United States and a foreign nation, *if the honor of the United States* requires that the award should be set aside, it can be done by *a new treaty*.

II.

The award was final and conclusive by express stipulation between the high contracting parties.

In making treaties with foreign nations for the adjudication of claims of citizens or subjects on such foreign nations, the United States, more than ninety years ago, introduced in such treaties a clause which has always been intended to bind the honor of both governments to submit to, carry out, and perform the decisions and awards of the

tribunal constituted under the treaty. See especially the following treaties:

Treaty of October 27, 1795, between the United States and Spain. Article XXI.

Treaty of August 11, 1802, between the United States and Spain.

Treaty of February 22, 1819, between the United States and Spain. (This treaty did not embrace the finality clause in express terms, but in *Comegys* v. *Vasse* (1 Peters, 193–212), the Supreme Court of the United States held that an award of the commissioners under the treaty was not re-examinable; it was the decree of a competent tribunal of exclusive jurisdiction.)

See also similar treaties with Great Britain in 1822, 1853, 1863, each of which contained the most solemn stipulations for the finality and conclusiveness of the awards.

Treaty of January 15, 1880, with France, using the same language that was employed in the treaty with Mexico, cited in the relator's petition.

Treaty with Ecuador in 1862.

There are about fifteen such treaties containing the finality clause, all contained in the volume published by the State Department in the present year. (See the index of that volume.)

The purpose of the finality clause has always been this: That while, on the general principles of jurisprudence, the decisions of all courts of exclusive and final jurisdiction are conclusive, yet, in order to guard against an attempt to set aside a decision or award of an international court of arbitration, the United States have thought fit to introduce the practice of expressly stipulating that the decisions and

awards shall be final and conclusive. This practice has been resorted to in order to prevent the temptation to bring forward, after an award has been made, alleged proofs that it was obtained by fraud, which subsequent proofs, brought forward to impeach the honesty of the original claim, may, under the pressure of a strong temptation, be themselves fraudulent, and be manufactured to suit the exigency and get rid of the award.

In the latter part of November, 1876, the Mexican Minister in Washington informed Mr. Fish, Secretary of State, that the Mexican Government intended to show, at some future time, *and before the proper authority of the United States*, that *La Abra award* was fradulent and based on affidavits of perjured witnesses, with a view to appeal to the sentiments of equity and justice of the United States, *in order that the award made in favor of that company should be set aside.* On the 4th of December, 1876, Mr. Fish replied to the Minister:

"I must decline, however, to *entertain* the consideration of any question which may contemplate any violation of, or departure from, the provisions of the convention as to the final and binding nature of the awards, or to pass upon, or by silence to be considered as acquiescing in, *any attempt to determine the effect of any particular award.*"

The Mexican Minister replied, on the 8th of the same month, that there was no intention "to put in doubt the final and conclusive character of the above-mentioned awards," but only to express the possibility that the Mexican government might, at some future time, have recourse to some proper authority of the United States to prove that these claims were based on perjury, and that if such an appeal should be made it will not be resorted to as a means of discarding the obligation which binds Mexico, and that

should it prove unsuccessful the Mexican government will recognize its obligations as before.

See Senate Report 2705, part 2, 50th Congress, 2d Session; Views of Minority of Committee, page 43.

Mexico had bound her national honor to give full effect to the decision of the international tribunal, "without *any* OBJECTION, EVASION, OR DELAY *whatsoever*. As has been seen, the Supreme Court of the United States pointed out the only course that could, consistently with the honor and good faith of both nations, be resorted to in order to set aside or nullify any award made under the treaty. That course was resorted to by the initial step of negotiating a new treaty, but the final step to complete a new treaty was not taken, because the Senate of the United States refused to vary, repeal, or modify the finality clause in the original treaty, although the President of the United States proposed that this should be done, in order to make for Mexico an opportunity to substantiate her charge that the Weil award was obtained by fraud.

III.

Long before President Arthur submitted a new treaty to the Senate, the Weil award had become a final and conclusive adjudication. It was capable of being touched only by varying, repealing, or modifying the operation of the finality clause in the original treaty. This the Senate refused to do. The finality clause, therefore, remains in full operation to-day as the law of the land, governing the Weil, and every other award made under that treaty. No branch of the Government of the United States can refuse to execute, or interfere with the execution of, a plain law, so long as it remains a law. The President of the United States has no more power to suspend or disregard the law of the original

treaty, than he would have to suspend or disregard a statute which imposed on him an executive duty, which statute had not been repealed or varied, or made inapplicable in a particular case. After the Senate had rejected the proposed new treaty with Mexico, there remained a plain ministerial duty to be performed by the State Department, namely, to distribute and pay to Weil, or his lawful representatives or assigns, the money lying in the Department, and paid by Mexico on account of this award.

IV.

The attention of the Court is specially requested to the opinion of Mr. Chief-Justice Waite in Frelinghuysen *v.* Key (110 U. S. R. 63.) It was there held, that *while the two Governments were negotiating* (and they were negotiating about this award so long as the proposed new treaty was pending in the Senate), the President of the United States could withhold payment from an assignee under the Weil award. It would be entirely inconsistent with the whole doctrine on which the Supreme Court rested the power to vacate an award *by a new treaty*, to hold that after the Senate had refused to concur in a treaty which proposed to vary or modify the finality clause in the original treaty, the President of the United States, or the Secretary of State, have *any power whatever* to continue to refuse payment to Weil, or his representatives or assigns, of the money lying in the Department. After the Senate had rejected the new treaty, the relator's right to require payment, which was a vested right before that rejection, became again vested by reason of that rejection.

V.

Suggestion is made that *Congress* may yet in some way legislate on this subject. No Congress has heretofore legis-

lated on it, although attempts to procure legislation have been made in several Congresses, since the act of June 18, 1878. This act is commented on and construed in the opinion of Chief-Justice Waite. It was held to be a mere request to the President to withhold payment from the then relator: that it conferred on the President no power that he did not possess before; and that his power to withhold payment, *during an incomplete negotiation*, rested entirely on his official prerogative as the Executive head of the Government, and the organ of intercourse with foreign nations.

The proposed new treaty never having become a law, there remained nothing but a ministerial executive duty to be performed by the Secretary of State under the law of the original treaty, and under the 1st section of the act of June 18, 1878.

VI.

Boynton, the relator, states in his petition, on his oath (and this is not denied), that within one month and four days after the Weil award had been made and reported to the State Department, he became assignee of a certain part of it by an instrument under seal, executed by all parties then having a title to or interest in the award. He was therefore an innocent purchaser for value of a part of a judgment which rested on the public faith of both the governments which had made the treaty of July 4, 1868, which treaty contained the finality clause. Boynton had, and every one had, a right to rely on the provisions of the treaty. If such judgments, so rendered, are not good and valid securities; if they can be impeached by evidence, or pretended evidence, brought forward after they have been rendered, what foundation of personal rights and personal property are secure? Nothing had transpired before Boynton acquired his interest, and nothing has transpired since to dis-

place, repeal, or modify the finality clause in the original treaty. It remains the law of the land to this day. The highest judicial tribunal has decided that it could be modified or varied *by a new treaty*, and this was an exclusion of every other mode of varying or changing its operation. The decision of the Senate not to vary or change its operation leaves it just where it has always been—an operative, binding, and unrepealed law, which the Executive cannot refuse to execute, and which an act of Congress cannot change.

The doctrine embraced in the decision of the Supreme Court in *Frelinghuysen* v. *Key* covers two distinct and separate grounds: *First*, that the parties to the treaty of July 4, 1868, could, by *a new treaty*, vary, displace or affect the operation of the finality cause; *second*, that the President's power to withhold payment from any party claiming an interest in the Weil award *while the two governments were negotiating*, rested not on the act of Congress of June 18, 1878, but on the President's prerogative as the organ of intercourse with a foreign nation. This doctrine does not assume that the United States was the party in whose favor the award had been made. It assumes, correctly, that the United States, as the only power that could prosecute such a claim, undertook to prosecute, for one of their citizens, a claim against Mexico, before an international tribunal of arbitration, constituted under a treaty with Mexico. This gave the United States no property or interest in the claim; the Government of the United States acted only as a trustee or agent for the claimant; it received the money paid in by Mexico on the award as such trustee or agent, and not for itself or for its own interest. It undertook to distribute and pay over this money to the original claimant, or his lawful representatives or assigns. This undertaking was not made in express terms in the treaty, but it is necessarily implied in the relations between the United States

and those of their citizens whose claims they undertook to prosecute before the international tribunal. It is implied, too, in the nature of the claim, which was that of a citizen of the United States for an injury done to *his* property by the Mexican authorities. The money paid in by Mexico could not now be covered into the Treasury as money belonging to the United States, or be paid back to Mexico under an act of Congress, without committing spoliation and robbery. It lies in the Sub-Treasury in New York, as money paid into the Department of State under a treaty, and the books of that Department show, as may be inferred from the answer of the respondent, that a portion of it is applicable to this award, and to no other purpose. While, therefore, it may have been true, as the Supreme Court held, that the President could withhold payment from Weil's assignee, Key, *during the pendency of a new treaty, and while negotiation was going on*, it is not at all true that this power of the President was rested on any interest, right, or title of the United States in or to the money lying in the State Department. The whole doctrine of the Supreme Court was that the Government of the United States, one of the parties to the original treaty, had a right, in order to protect the national honor, *by a new treaty*, to give Mexico the opportunity to show that our Government had been made the instrument of prosecuting and recovering a fraudulent claim against a friendly nation. The Senate having refused to concur in the proposed new treaty, the negotiation was at an end, and the honor of the United States was fully and finally satisfied and exonerated.

The Act of June 18, 1878.

We will now advert to the act of Congress passed June 18, 1878, because the respondent's answer rests the lawful-

ness of the *President's* refusal to allow any further payment to Weil *upon the provisions of that act.* That act was passed eight years before the Senate rejected the proposed new treaty which was submitted to the Senate by President Arthur. Its legislative history is important. On the 19th of January, 1877, Mr. Fish, Secretary of State, addressed a letter to the House Committee on Foreign Affairs, suggesting "the necessity of making provision for *carrying into effect the awards* under the convention between the United States and Mexico of July 4, 1868." Among other provisions suggested by the Secretary, he proposed one that would definitely fix *the official custody* of the funds which Mexico was to pay in order to meet and satisfy the awards made in favor of citizens of the United States. The Secretary might have rested content with the uniform previous practice of his Department, by which the head of that Department had received many millions of money, under similar treaties, and had distributed and paid them over to the parties entitled to receive them. But after the Mexican Minister had informed Mr. Fish of the purpose of his Government to attack these two awards, Mr. Fish desired the passage of a law which would definitely fix *the official custody* of the funds that Mexico was to pay. Accordingly, he enclosed to the House Committee a draft of a bill entitled "An Act to provide for the distribution of the awards made under the convention between the United States and the Republic of Mexico, concluded on the fourth day of July, 1868."

Nothing was finally done with Mr. Fish's bill until the Act of June 18, 1878, was passed.

When it was passed, Secretary Fish was out of office, and Mr. Evarts was Secretary of State. Mr. Fish's bill underwent considerable modifications in Congress before it became a law; but the law that was passed shows plainly:

1st. That the official custody of the funds was vested by it in *the Secretary of State* and not *in the President*. There are several provisions of statute law which make it the duty of the Secretary of State as well as the heads of other Departments to do certain official acts without the direction or control of the President. In such cases, the heads of Departments are executive officers, charged by law with the performance of certain duties, in which they act independently of the President.

2d. That the 5th section of the Act of June 18, 1878, as explained and construed by the Supreme Court, was a mere request made by Congress to the President to suspend further payments on these two awards until *he* should have investigated the charges made against them by Mexico, in order that he, the President, might determine whether the awards ought to be reopened and the cases retried.

This did not in any manner change the official custody of the funds, as it had been fixed by the 1st section of the act. If the President should comply with the request (as President Hayes did), and should decide (as he did) that neither the honor of the United States nor the principles of public law or considerations of honor and justice required that the cases should be retried, the official custody of the funds would remain in the Secretary of State, and it would be his official duty to distribute and pay them to the claimants.

According to Mr. Fish's plan the *Secretary of the Treasury* would have held the official custody of the money, in trust to distribute and pay it out to certain parties. The President could have had nothing to do with it.

Instead of vesting the official custody of the funds in the Secretary of the Treasury, the 1st section of the act as it was passed, put it in *the Secretary of State*, and made it *his* duty to distribute and pay to the claimants. Then the 5th section of the act proceeded to recite that the Government of Mexico had

called the attention of the Government of the United States to two of the claims with a view to a rehearing, and then followed the *request* to the *President* to investigate any charges of fraud presented by the Government of Mexico as to these two cases, and if he should be of opinion that both or either of them ought to be reopened and retried, it should be *lawful* for him to withhold payment until the case or cases should be retried and decided in such manner as the two Governments might agree, "or until Congress shall otherwise direct." As a *law*, this provision had no force. It was a mere request to the Executive to make a certain investigation. It did not change the official custody of the money, which the 1st section had fixed in the Secretary of State. If the President should comply with the request of Congress and make the investigation, further action would depend upon what *he* might propose or do. The official custody of the money would remain in the Secretary of State, plainly impressed with a trust to distribute and pay it to the claimants.

See Mr. Fish's letter and draft of a bill. House document No. 39, 44th Congress, 2d session.

Mr. Fish's letter and draft of a bill show:

1st. That he made no exception in regard to any of the awards, and did not contemplate any investigation into the merits of the original claims. He could not have done so consistently with his letter of December 4, 1876, to the Mexican Minister, quoted above in this brief.

2d. That Mr. Fish contemplated a definite provision by law for the official custody of the moneys which Mexico was to pay. This he proposed to do by authorizing the Secretary of State to *receive* them, and from time to time, as the same should be received, to transfer and pay them over to *the Secretary of the Treasury* (sec. 2 of Mr. Fish's

bill). By the 3d section of this bill, *the Secretary of the Treasury* was required to deposit the moneys in the Treasury of the United States, and they were by the same section and *eo instanti appropriated*, to be from time to time distributed among the private individuals, corporations, and companies, citizens of the United States, in whose favor awards had been made, or to and among their respective legal representatives or assigns. This provision, if it had become a law, would have impressed the moneys in the hands of the Secretary of the Treasury with a trust in favor of the parties to whom the awards had been made. The 6th section of Mr. Fish's bill made it the duty of the Secretary of the Treasury to distribute the moneys *so held by him* in ratable proportions among the corporations, companies, or private individuals, citizens of the United States, in whose favor awards had been made. If this provision had become a law and the Secretary of the Treasury, after the moneys had been paid into his hands by the Secretary of State, had refused to make this distribution and payment required by the 2d, 3d, and 6th sections of the bill, it cannot be doubted that an injured party would have been entitled to redress by *mandamus*.

The 5th section of this act of 1878, as it was finally passed, contemplated retrials of the original claims "in such manner as the Governments of the United States and Mexico shall agree;" and the request to the President to suspend further payments to the claimants operated until they should have made such an agreement, or had tried to make it, and had failed to make it, and no longer. But to this request the 5th section added the words, "or until Congress shall otherwise *direct*." These words were not in Mr. Fish's bill. They were inserted in the 5th section before the act was finally passed. Mr. Fish was much too enlightened a person to suppose that full and final *execution of*

a treaty was to be suspended indefinitely, until Congress should give some final direction *how* it was to be executed. But these words have been supposed to operate as a reservation to Congress of some power to direct how this treaty of July 4, 1868, is to be fully and finally executed, or at least to imply that Congress has such power. The question now is, therefore, what is the legal force of these words, "or until Congress shall otherwise direct?" Let it be observed that this whole matter relates to the execution of a treaty, and that the Supreme Court of the United States have held that Congress could not *direct* the President, but could only make a *request* to him. The 5th section made an alternative request to the President, to withhold payment from Weil until his case had been retried in such manner as the two governments might agree, "or until Congress shall otherwise direct." The first part of this clause was simply a request; the latter part of the clause went further, and assumed that Congress had some power to *direct* what should be done in the event that the two Governments should not have agreed on what was to be done. We deny entirely that Congress had then, or has now, any such power. What is to be done with this money depends entirely on the provisions of the treaty, and the rights of parties in whose favor awards were made under that treaty. Yet the respondent's answer claims that the President can, *in compliance with the wish* of Congress, indefinitely postpone and frustrate Weil's enjoyment of his rights until Congress shall have given him, the President, some direction what he is to do with this money. How long is that wish to operate? It will have just as much force ten or twenty years hence as it has now. If the present or any future Congress should pass another law directing the President what to do or not to do with this money, it would, as a law, be wholly *ultra vires*. In the meantime, unless the first section of the act of

June 18, 1878, were repealed or modified, the *official custody of these funds would still remain in the Secretary of State*, and it would be his duty, as it is now, to distribute and pay them to the claimants, for the request made to the President in the fifth section has spent all the force that it ever had.

At the time when Mr. Fish addressed his letter to the House Committee, the government of Mexico had already informed Mr. Fish of their purpose to show to the *proper authority of the United States* that two of the awards were based on fraudulent claims; and Mr. Fish's answer and the Mexican Minister's reply are above quoted in this brief. Mr. Fish, therefore, in the bill which he sent to the House Committee, desired to fix definitely the *official custody* of the funds, and to make it the official duty of the custodian to distribute and pay them to the claimants. It is perfectly apparent that Mr. Fish did not propose or desire legislation that would have the effect to reverse or displace the finality and conclusiveness of the awards.

History of Former Investigations.

It may be well to state succinctly the history of the different investigations that have been made into *the integrity of Weil's evidence*, by which the Executive Government of the United States established his claim before the Commission. The first investigation was made in the State Department by Secretary Evarts, under the direction of President Hayes, after the passage of the act of June 18, 1878. In that investigation agents of Mexico were fully heard on all the evidence which they claimed substantiated the charge that Weil's claim was an out and out fraud. The investigation was made because Congress had requested the President to make it, in order to ascertain whether the fourth

installment should be distributed and paid to Weil, three previous installments having been already distributed and paid. Secretary Evarts reported to the President, after a long hearing, that neither the honor of the United States, the principles of public law or justice and equity required that the Weil or La Abra award should be set aside and new trials be had. At the same time the Secretary said that there was grave reason to doubt whether Weil's claim was an honest one, and that the honor of the United States required a further investigation; but that the President was not armed with powers to summon witnesses, &c., for that purpose. Thereupon President Hayes directed distribution and payment to Weil of his distributive share of the fourth installment. Then, in order to apprise Congress distinctly that if further resistance was to be made to Weil's award, he, the President, must be provided with the means of prosecuting the further inquiry which the Secretary had reported ought to be made, the President communicated the Secretary's report to the Senate. This occurred in 1880. President Hayes' administration expired March 4, 1881, and President Garfield became his successor. Congress had in the meantime done nothing on the subject. The present Secretary of State was then Secretary in President Garfield's administration, and he distributed and paid to Weil his share of the fifth installment on the 8th of March, 1881, Congress having done nothing in compliance with President Hayes' recommendation. Down to this time, therefore, all the action of the Executive had been taken under the request of the act of June 18, 1878, and had resulted in nothing, as to further investigation, but the recommendation of President Hayes, which Congress did not heed. All this while the finality clause of the treaty of July 4, 1868, was in full operation. It was because of this clause that Secretary Evarts, in his report

to President Hayes, conceded the finality of the awards as between the United States and Mexico, although he added, that the matter submitted to the attention of the Government by Mexico brought into *grave doubt* the substantial integrity of Weil's claim, and that the honor of the United States required further investigation by the United States to ascertain whether the Government of the United States had been made the means of enforcing against a friendly nation a claim of one of our citizens based upon fraud. Whether, if Congress had in any appropriate manner provided the means of further investigation, as suggested by Mr. Evarts, President Hayes or President Garfield would have negotiated a new treaty with Mexico, can only be conjectured. It may be conjectured also that Secretary Evarts had in contemplation criminal proceedings against Weil, or his witnesses, for he said in his report that the future measures to be taken would depend on the result of the further investigation, which might remove or might confirm the doubt concerning the "substantial integrity" of Weil's claim. But as Congress made no provision for further investigation by the President, the matter was left just where it was before, when President Arthur and Secretary Frelinghuysen succeeded President Garfield and Secretary Blaine. Now, it may be very true that the act of June 18, 1878, as a *request* to the President of the United States to investigate the integrity of the Weil award before any further distribution and payment should be made to Weil, was still operative with President Arthur, and that he was not concluded by what had been done under President Hayes or President Garfield; yet it is important to see what President Arthur and Secretary Frelinghuysen did. It is a just inference from the recitals of the new treaty which they negotiated that they examined all the evidence which Mexico had lodged in the State Department before

they negotiated and signed the new treaty. It is also a just inference that President Arthur and Secretary Frelinghuysen had, or may have had, alleged evidence which was not before President Hayes and Secretary Evarts, and which led President Arthur to be of opinion that Weil's case should be reopened and retried. But although President Arthur, in his proposed new treaty, said that, considering the circumstances of the case, *and in view of the act of June* 18, 1868, he had come to entertain that opinion, he took an entirely new method, different from any that had been taken under that act, or in consequence of it. He used his constitutional power to negotiate and submit to the Senate a new treaty, agreeing with Mexico that the Weil and La Abra awards should both be set aside (" are hereby set aside ") as to installments not paid by Mexico before January 31, 1882, and that there might be a reopening of both cases and new trials before a new international tribunal of arbitration. President Arthur sent into the Senate, along with the proposed new treaty, all the old and all the alleged new evidence which was claimed as having any tendency to show these claims to have been fraudulent. The Senate rejected the proposed new treaty on the 21st of April, 1886, thereby leaving the finality clause in the treaty of July 4, 1868, in full operation.

Now, each of the following propositions is inevitably true :

1st. That the Act of June, 1878, as a request to the President, had spent its force when President Arthur sent his new treaty to the Senate, and no further investigation by the President could be made to any practical purpose unless Congress should arm *him* with appropriate and further means for making it, which Congress has never done.

2d. That inasmuch as President Arthur was influenced,

if at all, by the Act of June 18, 1878, only to the extent of examining the old and the alleged new evidence adduced by Mexico to show Weil's fraud, in order to satisfy himself that he ought to negotiate and send to the Senate a new treaty, and to inform the Senate that Mexico *charged* that Weil's claim as presented before the Commission was wholly based upon fraud; and inasmuch as the Senate, after nearly four years of deliberation and discussion, rejected the proposed new treaty, every constitutional method of annulling Weil's award has been exhausted, and it remains a final and conclusive adjudicated claim under the law of the land. The course suggested by the answer of the respondent as now remaining, is for Congress to pass a bill conferring on a municipal court of the United States the jurisdiction proposed by the pending Senate bill, namely, an appellate jurisdiction to reopen and retry awards made by an international tribunal of arbitration constituted under a treaty. This jurisdiction Congress cannot confer, for the reasons hereafter assigned.

It is of no force whatever to contend, as Secretary Bayard did in his report to President Cleveland, that this is now a domestic question between the United States and one of their citizens, and not an international question. The preamble of the proposed Senate bill makes the motive for conferring the proposed jurisdiction on a municipal court of the United States, that the honor of the United States, not their property interests or rights, requires that the integrity of Weil's claim should be reinvestigated *in a Court of the United States*. The honor of the United States is no ground for conferring jurisdiction on a Court of the United States. Their honor has been fully vindicated and satisfied by the negotiation of a new treaty, which the Senate rejected.

Neither is it of any force to cite the cases of Atocha,

Gardiner, and other cases in which awards have been set aside or disregarded on account of imputed frauds. In none of those cases had there been a new treaty proposed to the Senate, passed upon by the Senate and rejected by the Senate, as there has been in this case and the case of La Abra against Mexico.

The only suggestion made in the respondent's answer concerning a pending bill refers to the bill that was pending in the Senate during the Fiftieth Congress. In the present Congress Senator Morgan again introduced this bill, and had it referred to the Committee on Foreign Relations. On the 17th of December, 1889, he reported it back with amendments. Perhaps this Court will be asked by the counsel for the respondent to compare it.

A perusal of it will show:

1st. That it is entitled "A bill to amend and enlarge the act approved June 18, 1878." This, therefore, rests the proposed new bill on the power supposed to have been reserved to Congress by the words, "or until Congress shall otherwise direct," in the act of June 18, 1878, which have no legal or constitutional force.

2. That the preamble of the proposed new bill makes the honor of the United States, not their property rights or interests, the ground for conferring on a municipal court of the United States the jurisdiction proposed. It suggests no other ground. There is no head of jurisdiction in the scope of the judicial power of the United States, as limited by the Constitution, to which the proposed new bill can be referred. The preamble of the bill assigns as a reason for the investigation which it contemplates, that the *Executive* Government is not furnished with the means of making it, and that "the authority for such an investigation must proceed

from Congress." That is to say, the authority is to be exercised for the purpose of vindicating and protecting "the honor of the United States." The enacting part of the bill shows that this proposed investigation in a municipal court of the United States is not to be resorted to in aid of the *Executive*. It is to be resorted to in order to destroy Weil's award by the judgment of a municipal court of the United States, that award being a final and conclusive adjudication made by an international tribunal of arbitration constituted under a treaty.

3d. The Senate bill puts the proposed jurisdiction in the *Court of Claims*. That Court is a part of the judicial power of the United States, established for the purpose of adjudicating certain kinds of claims against the United States. The bill authorizes and directs the Attorney-General to bring a suit or suits (it does not say whether at law or in equity) in the Court of Claims, in the name of the United States against Benjamin Weil, or his legal representatives or assigns, to determine whether the award made by the United States and Mexican Commission in respect to the claim of the said Benjamin Weil was obtained, as to the whole sum included therein or as to any part thereof, by fraud or false swearing, or other false and fraudulent practices on the part of said Benjamin Weil, or his agents, attorneys, or assigns. No such jurisdiction can be conferred on the Court of Claims, any more than on any other municipal court of the United States. The honor of the United States is the sole ground for conferring the proposed jurisdiction; and the honor of the United States is a matter between nation and nation, exclusively cognizable in the Diplomatic Department. The Court of Claims is invested by the proposed new bill with full jurisdiction "to hear and determine such suit, and to make all interloc-

utory and final decrees therein as the evidence may warrant according to the principles of *equity and justice*, and to enforce the same by injunction or any final process." That is to say, the Court of Claims may totally annul and set aside Weil's award by a final decree adjudging it to have been obtained by fraud, notwithstanding it now remains a final and conclusive adjudication by an international court. How does this square with the mode which the Supreme Court of the United States held to be, on principles of both international and constitutional law, the appropriate method for setting aside or annulling the award? If it was competent for the President and the Senate, acting together, to agree with Mexico that Weil's award should be set aside and a new trial be had before another international tribunal, it certainly is not competent for Congress to confer on a municipal court of the United States jurisdiction to annul, vacate, or set aside that award *in a suit brought by the United States for the purpose of vindicating or clearing the national honor from an imputation put upon it by a foreign power*. Congress cannot *withdraw from* judicial cognizance any matter which in its nature is the subject of a suit at common law, or in equity or admiralty; nor can it *bring under* the judicial power a matter which from its nature is not a subject for judicial determination. (Murray *v.* Hoboken Land and Improvement Co., 18 Howard, 272.)

4th. The proposed new bill makes it perfectly plain that, if it goes into effect, the Court of Claims will be made an appellate tribunal to revise, review, re-examine and change a final and conclusive adjudication made by an international court, for it directs the Secretary of State to certify to the Court of Claims "copies of all proofs admitted by the said Mixed Commission *on the original trial of said claim*, and

the said Court shall receive and consider the same in connection with such competent evidence as may be offered by either party." This makes the Court of Claims an appellate tribunal to examine the record of the international court on the evidence on which the latter made the award, together with any new evidence that may be offered by either party. When it is considered that the suit is to be in the name of the United States, backed, of course, by all the resources, pecuniary and otherwise, which the Attorney-General can command, the proposed new bill, if it takes effect, will put the United States in the strange attitude of seeking to annul a decision of an international court which the United States and Mexico both stipulated in the most solemn manner should be final and conclusive; and to do this by conferring on a municipal court of the United States appellate jurisdiction to retry the original claim. If it is said that the United States, by the finality clause in the treaty of July 4, 1868, did not pledge their public faith to their own citizens, who might assert claims against Mexico, but only bound themselves and Mexico by a mutual covenant to carry out the decisions of the international court, the answer is twofold: *first*, the citizen for whom the United States prosecuted and recovered a claim has at least a right to require the United States, if her national honor was involved in the prosecution and recovery of that claim, to hold Mexico to the kind of redress sanctioned by the Supreme Court of the United States, the only method that ever could have been resorted to; *secondly*, that the Senate, a co-ordinate part of the treaty-making power, has refused to consent to a repeal or change of the finality clause in the treaty of July 4, 1868.

5th. The proposed new bill provides that, in the event that the final decrees of the Court of Claims shall set aside

Weil's award, in whole or in part, "the President of the United States is *hereby* authorized to release the Government of Mexico from the further payment thereof, to the extent that the same is so declared fraudulent, and to return to said Government any money paid by the Government of Mexico on account of said award remaining in the custody of the United States that has not been heretofore distributed to said Benjamin Weil, his legal representatives or assigns, which *said Court* shall decide that such persons are not entitled in *justice and equity* to receive out of said fund." That is to say, the President himself, as the organ of intercourse with a foreign nation, or the President and the Senate together, are not to decide what justice and equity require to be done with this money, but the President is to be authorized by this bill to pay it back to Mexico on the finding of the Court of Claims that Weil or his representatives are not entitled *in justice or equity* to receive any more of it.

6th. The standard of determination which the Court of Claims is to apply, is what "justice and equity" require to be done *towards Mexico*, not what the law requires to be done *towards a citizen of the United States*, who became, as the relator did, an innocent purchaser for value of a part of the Weil award. What will the Court of Claims do with the finality clause in the treaty of July 4, 1868, now and always the law which governs the rights of Weil, his representatives or assigns? The new Senate bill, instead of requiring the Court of Claims to be governed by the law of the land, gives that Court as the standard of its determination the vague phrase "justice and equity." What justice and equity require, if anything, to be done towards Mexico, after the Senate refused to confirm the new treaty, is a matter for the exclusive consideration of the President and the Senate, and not for Congress.

7th. The proposed new bill undertakes to make it *unlawful* for the Secretary of State, during the pendency of the proposed suit or suits, to make any further payment to Weil or his representatives or assigns out of the funds now in his Department. Now, these funds are in the custody of *the Secretary of State*, under a provision of a statute, the act of June 18, 1878, sec. 1. They were paid in by Mexico to meet and satisfy Weil's award. Neither the United States nor Mexico has any property in them. They are impressed with a trust in favor of the claimants by the very terms of the act. The provisions of that act, whether regarded as a request to the President or as a direction, at most only suspended the payment until the President should investigate the award. The investigation made by President Hayes resulted in his ordering payment to Weil of the fourth installment. Whether President Garfield did or did not make any investigation, he ordered payment of the fifth installment. The investigation made by President Arthur was preliminary to the negotiation of a new treaty, and his authority to suspend further payment during that negotiation was because he *had* negotiated a new treaty. The refusal of the Senate to concur in that new treaty ended the President's temporary authority to suspend further payment, and the request made by Congress to the President was also ended. The act of 1878, as a direction or request not to pay any more money to Weil, had spent its force; and the money now remains in the hands of *the Secretary of State*, not in the hands of the President, as a fund lawfully applicable to no purpose excepting the payment and satisfaction of Weil's award, under a right vested in him by the law of the land.

The following cases fully establish the principle that a political question, such as what the honor of the United States required should be done towards Mexico, cannot by

an act of Congress be made a judicial question; and that when the political department of the Government has settled such a non-judicial question (as the political department has settled this, by rejecting a treaty providing for a new trial), the judicial department cannot be authorized to determine the same question over again.

Gordon *v.* The United States, 2 Wallace, 561; and the opinion in the Appendix to 117 U. S. R., page 628.
Luther *v.* Borden, 7 Howard, 1, 11.
White *v.* Hart, 13 Wall. 649.
Philips *v.* Paine, 92 U. S. 132, and cases cited.
United States *v.* Lee, 106 U. S. 209.
The Exchange *v.* McFadden, 7 Cranch, 116.
State of Georgia *v.* Stanton, 6 Wall. 50.

Frelinghuysen *v.* Key (110 U. S. 63) is to the same effect, for it shows that the Court regarded the question of granting a new trial to Mexico as a political one, which even Congress could not interfere with further than to make a *request* as distinguished from a *law*.

VIII.

Jurisdiction to compel executive officers to perform duties imposed upon them by law, where it is only a ministerial act to be performed, has been settled since the case of Kendal *v.* The United States (12 Peters, 610.) In the earlier case of Marbury *v.* Madison (1 Cr. 173), the Supreme Court of the United States refused the mandamus asked for against the Secretary of State, because they held that the 13th section of the Judiciary act, so far as it attempted to confer on them power to issue writs of mandamus in classes of cases not within their *original jurisdiction*, was unconstitutional and void. Marbury had applied for

the writ directly to the Supreme Court. If he had commenced the proceeding in an inferior Court of the United States, and an appeal had been taken to the Supreme Court, he would have obtained the writ; for the whole tenor of the reasoning in the opinion of the Supreme Court shows that to grant writs of mandamus directing executive officers to perform ministerial acts is an ordinary exercise of judicial power. Since then the jurisdiction of the several Courts of the United States to grant writs of mandamus has been regulated by statute.

See Revised Statutes, §.

ANSWER OF THE RESPONDENT.

The answer of the respondent may now be examined by paragraphs. It rests the defense against the application for a mandamus upon the following grounds:

1st. That the relator has not correctly stated the net balance due to him as an assignee of the Weil award. The answer admits, however, that there now remains in the State Department *on account of the said award* the net sum of $279,096.32, and it avers that the true balance due to the relator is the sum of $36,201.63, and not the sum of $37,-333.64. The relator's petition shows that the assignment to him covered the sum of $59,561, and that of this sum he has received $22,227.36 from the Secretary of State. The instrument of assignment on file in the Department shows that the whole sum assigned to the relator was made a preferred claim on the funds paid or to be paid in by Mexico to meet and satisfy the Weil award. No "scheme of distribution" that can be lawfully made by the Secretary can displace the relator's lien on the whole fund to the full extent of the sum remaining unpaid to the relator, namely, the sum of $37,333.64. No deduction on account of the ex-

penses of the Commission, or for any other purpose, can be lawfully charged upon the sum assigned to the relator. Such deduction or charge must fall upon the net sum of $279,096.38 now lying in the official custody of the Secretary as applicable to the Weil award. After every deduction that can be lawfully made has been charged upon the net sum of $279,098, there will still remain much more than enough to satisfy the relator's demand.

2d. That on a ground subsequently stated in the answer, "the President of the United States has *forbidden* the payment of any part of the said net balance (the net sum of $279,096.38 paid in on account of Weil award), and for that reason *no scheme of distribution has been made*, and that it would seem to be improvident to state absolutely, at this time, what amount of the said net balance would be paid to the relator in the event that the President of the United States *should hereafter be of the opinion that a ratable part of the said net balance should be paid to the relator* as assignee of said Weil." This rests the appeal to the Court to refuse the mandamus entirely upon the validity and sufficiency of the President's grounds for prohibiting *any* payment. It is not for the Secretary to say whether it is now improvident or provident to state what amount is to be paid the relator, because the precise amount is the sum of $59,561, less the amount of $22,227.35.

3d. The answer avers that the United States assumed to have, and did have, an interest in the said claim, and that the President now has power to *control* the money paid on this award by Mexico, *in his discretion*, and to withhold or allow payment of any part of it from or to the relator, as he, the President, may determine to be "for the interests of the United States." This assumption of an interest of the

United States in the original claim, and of a power in the President to control the distribution and payment of the money paid in by Mexico, is rested on the further assumption that, "in order to enable the Government of the United States to make the said claim the subject of an international demand against Mexico, it was necessary that the said claim should pass entirely beyond the control of *Benjamin Weil*, *the owner*, and become subject to the control and authority of the United States, and be held and treated as a claim of the United States against the Republic of Mexico, to be paid or satisfied in any manner that might be agreed on by the two governments, or to be released to the Republic of Mexico without satisfaction of any kind if it should be deemed for the interests of the United States." To this there are several answers:

First.—According to international law and practice, a sovereign can take from a subject or citizen an assignment of a claim on a foreign nation, and prosecute it in his own behalf and for his own interest, either by reprisals or war, or by negotiation and treaty; or the sovereign can, without becoming owner of the claim, prosecute it for his subject or citizen, in any manner that is in accordance with the usages of nations. But where a sovereign is one of limited powers, which are defined by or deduced from a written constitution, if he does not take an assignment of the claim and make it his own, he must prosecute it for his subject or citizen in the relation in which he stands, namely, as a trustee or agent for the claimant, and as the only trustee or agent who can hold intercourse with a foreign nation in regard to private claims. When the States of this Union transferred to the United States all power to redress wrongs done to their citizens by foreign nations, they clothed the United States with a sacred trust and im-

posed upon them a peculiar duty, which no other power can now discharge.

SECOND. The treaty of July 4, 1868, will not bear the construction put upon it by the respondent. Weil never assigned his claim to the United States; and the provisions of the treaty show throughout that it was the *claims* of corporations, companies, or private individuals of both nations against the Government of the other, *arising from injuries to their persons or property*, and not claims of the United States, that were referred to arbitration between the two governments, and that have been adjudicated by the international tribunal. Necessarily, it was for each government to appoint a suitable person to appear before the tribunal and prosecute "each and every separate claim." (Article II of the Treaty.) This did not make either government the owner of any claim that was presented; nor is there a single provision in the treaty which, when rightly interpreted, looks that way. The United States never released Weil's claim to Mexico. They could, and did, as a sovereign acting for a citizen, submit his claim to adjudication by the international tribunal. The tribunal adjudicated it, and as the treaty required, as the claim of an individual against Mexico, and so the award expressly reported it. The original claim passed into a judgment in favor of a citizen of the United States, and the only relation to either the claim or the award in which the Government now stands is, as an executive duty resulting from the treaty, to pay over to Weil, or his assigns, the money paid in by Mexico to meet and satisfy his award. The property right of Weil and his assignees in this judgment is as complete as their right to the clothes that they wear. (See 11 Pet. 100; Freeman on Judgments, § 217, 1 Black. Com. (3d edition 456–7, note 3); Sinking Fund Case, 99 U. S. 733.

THIRD. The mode provided by the treaty for the settlement and payment of the balance of money resulting from setting off "the total amount awarded in all the cases decided in favor of the *citizens* of the one party," against "the total amount awarded to the *citizens* of the other party," and the provisions which determined the place, time, currency, and amounts of such payments, did not give the Government of the United States any interest or property in the original claim or the award. Nor did the decision of the Supreme Court in *Frelinghuysen* v. *Key* mean to assert that the Executive, or Congress, or the Government of the United States, had any power to control the distributions and payments of the money to the persons holding the awards, because the treaty had provided that the total sum to be paid should be fixed by setting off the total of all the awards made in favor of citizens of one of the countries against the total amount of the awards made in favor of citizens of the other country. A claim of this description could not become the property of the United States without an assignment executed by the claimant; and the treaty did not operate, and was not intended to operate, as giving the United States any such interest or property or control as is contended for by the respondent.

FOURTH. The United States have made treaties with foreign nations for the adjudication and settlement of claims of their citizens, which did operate to give the United States a *kind of property* in the claims which they could and did use for their own purposes; but this treaty with Mexico does not belong in that category. For example, by the treaty of 1819, between the United States and Spain, by which we acquired Florida, *the United States* agreed to appoint Commissioners to adjudicate and determine all claims of certain descriptions which their citizens asserted against

Spain, and to pay such claims as might be admitted and adjudicated by the Commissioners, or the major part of them, to an amount not exceeding $5,000,000, *either immediately at their Treasury*, or by the creation of a six per cent. stock, payable from the proceeds of public lands within the territories ceded to the United States by the treaty, or payable in such other manner as Congress might prescribe by law. There the United States assumed an ownership of the claims of their citizens on Spain; used their own money to pay them; and released Spain from them entirely. The claims, after they had been adjudicated by the Commissioners, *were paid at the Treasury of the United States in money of their own.*

It is well known how, when we acquired Louisiana in 1803, the United States used for their own purposes the claims of our citizens on France for spoliations committed prior to 1800; how France was released from their payment to the claimants; how the United States undertook to pay them; and what a long, vexatious, and discreditable delay took place, in which three generations of the claimants went to their graves without receiving a dollar.

It is also well known how, by the treaty of May 8, 1871, between Great Britain and the United States, the latter dealt with the so-called "Alabama Claims;" that the United States presented a *national* claim against Great Britain for injuries done to our commerce *as a unit;* that the tribunal which sat at Geneva awarded a gross sum as damages sustained by the *United States;* that the tribunal adjudicated no individual claim; that the gross sum awarded to the United States was promptly paid, and that it was left to the United States to determine and pay the individual claimants in such manner and amounts as they thought proper.

None of the foregoing, or any of the similar treaties, are like that between Mexico and the United States, concluded

July 4, 1868. By the very terms of the latter the international tribunal was to decide and did decide on *individual* claims of citizens of the United States against Mexico. The only sense in which the United States can be said to have presented a *national* claim was that they acted as a nation presenting and vindicating the rights of their own citizens against another nation. They had no interest or property in any of the claims. All the interest or power that they had was to protect their own honor against being made an instrument to prosecute and recover a fraudulent claim. This they did, *first*, by appointing an agent to prosecute each claim before the international tribunal, and by submitting to *its* adjudication the honesty and validity of the claim. *Secondly*, by affording to Mexico an opportunity, *by the negotiation of a new treaty*, to show that two of the awards made by the umpire under the original treaty were founded on frauds. The decision of the Senate on the proposed new treaty was, that the finality clause in the original treaty should remain the law of the land as to these two awards, as it was the law in regard to all the others. The money paid in by Mexico never became the money of the United States; was not their money *ab initio*, and never can become such.

The opinion of Mr. Chief-Justice Waite in Frelinghuysen *v.* Key must always be read with reference to the point that was before the Court for decision; and its *dicta* or its *reasoning* must be understood as having reference only to the question before the Court. That question was twofold: 1st, whether, notwithstanding the very strong language of the finality clause in the original treaty, the two governments which made it could, by a new treaty, displace it, by mutually releasing each other from its obligations in a particular case; 2d, whether, during the pendency of a negotiation looking to such mutual release, the President of the United States could, of his own authority, suspend further

payments to the parties whose awards Mexico called in question, as awards based upon fraudulent claims. Both of these questions were answered by the Court affirmatively. All that was said by the Chief Justice in reference to the provisions of the original treaty, which required that the claims should be presented by an agent of each government respectively, and all that he said in reference to the mode of ascertaining and adjusting the amounts due from one government to the other, on account of the demands of their respective citizens, was not said for the purpose of deciding that either government was the owner of any of the claims or awards, or had any property in them. It was said for the purpose of illustrating *arguendo*, the principal question that the Court had to decide, namely, whether, notwithstanding the very strong language of the finality clause in the treaty of July 4, 1868, the two governments could by a new treaty release each other from its obligation in a particular case. In order to reach an affirmative answer to this question it was not necessary for the Court to hold that the United States had a proprietary interest in the claim or the award in question, or in the money that might be paid by Mexico to meet and satisfy the award. It was only necessary to show that the *claimant* could not require his own Government to refrain from vindicating the national honor by making a new treaty with Mexico, for a retrial of the original claim before a new international tribunal, in a case where Mexico charged that the national honor of the United States was compromised by the prosecution and recovery of a fraudulent claim. This, together with the decision of the President's power to suspend payments to the claimants while the new treaty was pending in the Senate was what the Supreme Court decided in Frelinghuysen *v.* Key, *and all that they decided.* The respondent argues that the commission did not recognize any

individual claimant. A reference to the award made by the umpire to Weil will show that in express terms not only was Weil recognized as the owner of the claim, but that the United States were in no manner and in no sense recognized as the owner of it, or as having any property in it. (See the Award of the Umpire, House Ex. Doc. No. 103, 48th Congress, 1st Session, page 25. The Award bears date October 1, 1875.)

4th. Another position taken in the answer of the respondent is, that "*If* the President of the United States has probable cause to think that good faith towards the Republic of Mexico and a proper regard for the honor of the United States requires that any part of the money so paid by the Republic of Mexico should be withheld from distribution, this respondent is advised that it is the duty of the President to withhold payment of the same until a proper investigation can be made." It is somewhat late in the day to set up such a power and duty on the part of the President after a new treaty has been submitted to and rejected by the Senate, which proposed to set aside these two awards and to have new trials of the original claims; or else the Supreme Court were mistaken in resting the President's power to suspend payment on the pendency of the proposed new treaty. The attention of the Court is invoked to the clause of the proposed new treaty which informed the Senate that these two awards were *charged* by Mexico to have been founded on frauds of the claimants. The Senate were also informed by the decision of the Supreme Court of the United States in *Frelinghuysen* v. *Key*, made before the final action of the Senate on the new treaty, that the President had power to suspend payment to these claimants *while that treaty was pending and incomplete.* What then did the new treaty submit to the Senate? It was distinctly and expressly to decide whether the Senate, as a co-

ordinate part of the treaty-making power, would consent to modify, repeal, or change the operation of the finality clause in the original treaty in regard to these awards, so as to give Mexico an opportunity to substantiate her charges of fraud in new trials of the original claims, not in a municipal court of the United States, but in a new international tribunal, to be constituted under the proposed new treaty. The Senate were necessarily brought to the consideration and investigation of "probable cause to think that good faith towards Mexico," &c., required the displacement of the finality clause of the original treaty. Their decision was that it did not. We do not rest the importance of this decision upon *conjectures* as to what influenced individual Senators; nor is it material what there is, or is not, "reason to suppose," as the respondent's answer suggests, it was that governed the votes of the different members of the Senate. The Court can only look at the question that was submitted to the Senate, and to the fact that it rejected the proposed new treaty, as a former Secretary of State has admitted that it did. (See Report of Secretary Bayard to President Cleveland, Senate Ex. Doc. No. 109, 50th Cong., 1st session. See also Secretary Frelinghuysen's new proposed treaty, as quoted in the relator's petition.)

In the opinion of Chief-Justice Waite in Frelinghuysen *v.* Key it was said: "As between the United States and Mexico, the awards are final and conclusive until set aside between the governments or otherwise." * * * "As between the United States and the claimants, the honesty of the claims is always open to inquiry, for the purposes of fair dealing with the Government against which, *through* the United States, a claim has been made." The two words "or otherwise" used by the Chief-Justice in the first of these sentences were clearly *obiter dicta*. There was no

question before the Court in relation to any mode of setting aside the awards excepting by negotiation between the two governments; and as between the United States and the claimants, the second of these sentences limits the inquiry into the honesty of the claims to the purposes of *fair dealing with Mexico* by means of a new treaty. When, therefore, a new treaty has been negotiated, submitted to the Senate, and rejected by the Senate, thereby leaving the finality clause in the original treaty in full operation, the purposes of fair dealing toward Mexico have been fully answered, both as between the United States and Mexico, and as between the United States and the claimants. Mexico cannot, after the Senate's rejection of the proposed new treaty, ask the United States to adopt measures for the purpose of destroying these awards by legislative or judicial action, which it is not in the constitutional power of Congress to enact or provide for; nor can the United States, as between themselves and the claimants, require the claimants to defend, in a municipal court of the United States, rights vested in them by a law which remains undisputed and in full operation.

The respondent has not pleaded any existing act of Congress which has vested in this Court, or in any other court, jurisdiction to retry Weil's original claim. He has only suggested that Congress *may* at some future time pass such a law. We deny the constitutional power of Congress to do any such thing. If the respondent had pleaded or should cite such an act, the Court would have to determine its constitutionality. The relator could not be estopped from denying its validity (see Town of South Ottawa *v.* Perkins, 4 Otto, 267). Where the respondent suggests only that Congress *may*, at some future time, pass such a law, the Court, if it heeds the suggestion at all, must determine whether it would be constitutionally valid if it were to become a law;

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because if it were a law, it would present the question whether it is an obstacle to the granting of the mandamus which the relator asks for. We are not aware that in cases of this kind it is customary for this Court, out of a supposed courtesy to the legislative department, to inquire what that department proposes or is likely to do, or to wait indefinitely to see what is to be done, in a case where a citizen asks for a remedy to enforce a plain legal right. The Court can only look at existing laws, or, if it considers at all what kind of a law it is proposed to make, it must inquire whether Congress has any constitutional power to do what it is suggested it may do at some future time.

The answer of the respondent does not say for what purpose the President wishes an investigation into the *integrity of Weil's evidence* which was submitted to the Commissioners and the umpire, and fully canvassed by them; or in what mode the President would have the investigation made. Does he wish for it in order to lay a foundation for the passage of the proposed Senate bill? The answer does not say. Does he wish for it in order to afford *him* the means of determining whether he will negotiate and propose to the Senate still another treaty, after the Senate has decided to leave tho finality clause in the treaty of July 4, 1868, in full operation? The answer does not say. So far as the answer of the respondent discloses or suggests any purpose for which the President wishes the investigation, it rests that purpose either on the proposed Senate bill, as a legislative measure, or on the supposed reservation to Congress of some power of legislation, by the words in the Act of June 18, 1878, "or until Congress shall otherwise direct." We have already shown that the proposed Senate bill undertakes to confer upon a municipal court of the United States a jurisdiction which Congress cannot confer; and that the words "or until Congress shall otherwise direct" have no legal

force whatever, because Congress cannot *direct* the President what to do or not to do with money paid into the State Department by Mexico on account of and to meet and satisfy this award.

As to any *legislative* action by *Congress*, looking to a judicial annulment of this award, the Court cannot fail to see that it would involve a matter arising in the execution of a treaty. When the act of June 18, 1878, was passed, there probably were not ten men in the House of Representatives who remembered the dignified rebuke given by President Washington to the House of Representatives in 1796, for undertaking to meddle with a matter that rested exclusively in the Diplomatic Department. The House, on the 24th of March, 1796, passed a resolution requesting the President "to lay before them a copy of the instructions to the Minister of the United States who negotiated the treaty with Great Britain, together with the correspondence and other documents relative to the treaty, excepting such of the said papers *as any existing negotiations may render improper to be disclosed*." Here there was a call on the President for the papers which embraced the negotiation of a treaty that *had become a law*. The President refused the call by a message, from which we make the following extract:

"The course which the debate has taken on the resolution of the House leads to some observations on the mode of making treaties under the Constitution of the United States.

"Having been a member of the General Convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject, and from the first establishment of the Government to this moment my conduct has exemplified that opinion, that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward be-

comes the law of the land. It is thus that the treaty-making power has been understood by foreign nations, and in all the treaties made with them we have declared and they have believed, that when ratified by the President, with the advice and consent of the Senate, they become obligatory. In this construction of the Constitution every House of Representatives has heretofore acquiesced, and until the present time not a doubt or suspicion has appeared, to my knowledge, that this construction was not a true one. Nay, they have more than acquiesced; for until now, without controverting the obligation of such treaties, they have made all the requisite provisions for carrying them into effect.

"There is also reason to believe that this construction agrees with the opinions entertained by the State Conventions, when they were deliberating on the Constitution, especially by those who objected to it, because there was not required in commercial treaties the consent of two-thirds of the whole number of the members of the Senate, instead of two-thirds of the Senators present, and because in treaties respecting territorial and certain other rights and claims the concurrence of three-fourths of the whole number of the members of both Houses, respectively, was not made necessary.

"It is a fact, declared by the General Convention and universally understood, that the Constitution of the United States was the result of a spirit of amity and mutual concession. And it is well known that, under this influence, the smaller States were admitted to an equal representation in the Senate with the larger States; and that this branch of the Government was invested with great powers; for, on the equal participation of those powers, the sovereignty and political safety of the smaller States were deemed essentially to depend.

"If other proofs than these, and the plain letter of the Constitution itself, be necessary to ascertain the point under consideration, they may be found in the journals of the General Convention, which I have deposited in the office of the Department of State. In those journals it will appear that a proposition was made 'that no treaty should be binding on the United States which was not ratified by a law,' and that the proposition was explicitly rejected.

"As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light, and as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved—a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbid a compliance with your request.

"G. WASHINGTON.

"UNITED STATES, *March* 30, 1796."

From this lucid message, it appears that the refusal was rested on the grounds: 1st. That the House could not have the information asked for, because its assent was not necessary to the validity of the treaty; 2d. That the treaty itself exhibited all the objects requiring legislative provision, and on these the papers called for could throw no light. The President then said, in conclusion, *that it was essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved.* They always have been hitherto. It has never since been supposed that the House of Representatives, when an appropriation of money was not needed, or alterations of our statute law, to meet the requirements of the treaty, were not needed, to carry a treaty into full execution, could have anything to do with its execution. In the present case the treaty has been executed, so far as to submit the claims of citizens of the United States to the international tribunal and to receive from Mexico the money paid on the awards made by the tribunal. The further execution of the treaty, by distributing and paying over the money to the parties entitled to receive it, remains. This is altogether, and exclusively, an executive duty. But it

seems to be supposed that, because Mexico *charges* that one of the awards was obtained by fraudulent means, Congress, in its legislative capacity, can arrest the further execution of the treaty, and can provide some mode in which the award can be annulled; and we have the startling suggestion that Congress can return the money to Mexico if it sees fit to "direct" that this be done!

If this would not be an interference with executive duties and functions and a confusion of the boundaries between the different Departments of the Government, it would be difficult to imagine what would be. President Arthur and Secretary Frelinghuysen made no such mistake. They acted within the "boundaries" of the Constitution. They negotiated and submitted to the Senate a new treaty, and the Senate refused to concur in it because they would not change the law of the original treaty, although they were fully apprised by the Supreme Court that they could do so if they saw fit. The succeeding administration (President Cleveland and Secretary Bayard), it is most respectfully submitted, made the mistake of appealing to Congress, to the Legislative Department, to signify "*its* FINAL JUDGMENT" on the awards referred to and make the *provision* contemplated by the Act of 1878 (see Ex. Doc., Senate, 50th Congress, 1st Session). The consequence was that this whole matter was hung up indefinitely during that Congress. That Congress went out of existence without doing anything; the Secretary of State continued to refuse to pay the parties holding the awards; and through the whole remainder of that administration this subject was a thorn in the side of the Executive, because the Executive had mistaken his duty and confounded the powers of the different Departments. President Harrison and Secretary Blaine have not exactly made the same mistake, as they have not asked for specific legislation. They only suggest that legis-

lation may yet come, and thus indicate that they are to some extent affected by this mistake of their predecessors. We have shown that this is no answer to the relator's right to the mandamus.

Any judicial investigation authorized by Congress for the purpose of impeaching the awards, or for any purpose that is to render them less final and conclusive than they now are under the law of the land, would be *ultra vires*. It is somewhat remarkable that a citizen of the United States, standing in a court of the United States and asking for a *mandamus* on an executive officer to enforce a right vested in that citizen by the law, should be told that some future Congress may contrive means, by legislation, to deprive him of that right, and that the President of the United States interposes to prevent his enjoyment of it. How long is the relator to wait and see what *Congress* will do? He may just as well be required to wait until doomsday as to be required to wait for the action of the present or any other Congress. Several previous Congresses have had this subject before them in various aspects; various bills have been *introduced*—nothing has ever been *done*. Nothing ever will be, that will be constitutional, for reasons which we now proceed to assign.

We are sorry to be obliged to say that few public men at the present day have a proper conception of the relations between the legislative and the executive branches of our Government on such a subject as this. There are men in both Houses of Congress now, and have been in former Congresses, who did not need instruction on such a subject. But they have been few. We are not addressing *them* or their colleagues. We are addressing a Court, to show the boundaries between legislative and executive powers and functions, inasmuch as the respondent has endeavored to make it necessary for the Court to stay its hand, because Congress *may* do something.

What the respondent's answer suggests as an obstacle to the mandamus is, that there was formerly a bill pending in the Senate which proposed to confer jurisdiction *on this Court* to review or modify a judgment of an international court of arbitration. If the Court shall now look into that former bill, it will find that it would, if it had become a law, have undertaken to authorize a municipal court of the United States, by a bill in equity, brought in the name of the United States, to set aside and nullify an award made in favor of a citizen of the United States against a foreign nation by an international tribunal of arbitration. In other words, it would have made a municipal court of the United States, an appellate tribunal, to review a decision of an international court, whose jurisdiction over the subject-matter was original, final, and exclusive. No such authority can be conferred on a municipal or domestic court of the United States, for two reasons: *First.* Because it would be contrary to international law, inasmuch as an international tribunal of arbitration is a court of the law of nations, and not a part of the judicial establishment of either country, which was a party to the treaty under which the international court was constituted. *Secondly.* Because the judicial power of the United States does not, under the Constitution, extend, and cannot be made by Congress to extend, to cases such as that contemplated by the former Senate bill, either at law or in equity.

The judicial power of the United States, as limited by the Constitution, extends, among other cases, "to cases arising under treaties," and to "cases in which the United States shall be a party." "Cases arising under treaties" are those in which some party other than the United States has a controversy with another party, capable of judicial determination, and requiring for its adjudication an interpretation of a treaty. Cases arising *in the execution of a*

treaty between the United States and a foreign nation are not within the judicial power, for the reason that they are cognizable only in the department of the Government which holds and exercises the treaty-making power. In this very case Mexico had a controversy with the United States, which was, whether the Executive Government of the United States was made an instrument for prosecuting and recovering a fraudulent claim against her, and what the national honor of the United States required should be done about it. This was a controversy between nation and nation. It was cognizable only in the diplomatic department of our Government. It cannot now, by any legislation, be made cognizable in the judicial department. The national honor is not at any time in the keeping of Congress, unless when the President asks Congress to declare war. At all other times, and under all other circumstances, the national honor is in the keeping of the President and the Senate. It was for them to determine what the national honor required in the present case, and not for *Congress;* and the Senate, as an equal and co-ordinate part of the treaty-making power, has decided that the national honor did not require that the award made in favor of Benjamin Weil should be disturbed.

"Cases to which the United States shall be a party" means cases in which the United States have some property right or interest to assert or defend in one of their own courts, as plaintiff or defendant, or in which they have to invoke the judicial power to administer or interpret some law, civil or criminal. Congress cannot, by arbitrarily making the United States a party plaintiff to a suit in equity or in law draw into judicial cognizance a controversy with a foreign nation, which simply involves an inquiry into what the national honor required the United States to do. If it could, it would follow that the President and the Sen-

ate, one or both, might take one view of what the national honor requires, and the judiciary might take another. The boundaries between the two departments are too clearly defined to permit of this.

We have gone into this branch of the subject, because this Court must see that if the proposed Senate bill were to become a law, and the proposed suit were to be brought, the Court would be at once confronted by the finality clause in the treaty of July 4, 1868, and the suit would have to be dismissed because of that clause, because the judicial power cannot take cognizance of a simple controversy between the United States and a foreign nation, and because the United States, having no property right or interest to assert or defend, cannot be made a party plaintiff in a suit in a matter that from first to last has involved only a question of the national honor.

There was a mode in which the diplomatic power of the United States could determine what the national honor required in this matter. This was to agree with Mexico that the award should be set aside, and that a new trial of the original claim should be had. This was the only method that could be resorted to, both on principles of international and constitutional law. It was attended with the great danger that fraudulent testimony would be brought forward to impeach the award. It is not at all probable that if Secretary Frelinghuysen and President Arthur had been aware of the contract between the Mexican Minister and Slaughter they would ever have negotiated the proposed new treaty However that might have been, it was competent for the President to negotiate that new treaty and submit it to the Senate. Whether the Senate rejected it because of the suspicious or unsatisfactory evidence brought forward to show the fraud which Mexico charged, or rejected it for any other reason, it is as certain and obvious as anything can be that

the Senate left the operation of the finality clause in the treaty of July 4, 1868, untouched, and that it remains the law of the land.

We can hardly treat with becoming seriousness that part of the respondent's answer, which suggests that if the Court should grant the mandamus asked for by the relator, he, *Mr. Blaine*, might be compelled to pay the sum demanded by the relator out of his own private means, because he holds the money paid in by Mexico "as the agent of the President of the United States, whose control over the same is complete, and who can at any time withdraw the said money from the control of this respondent; wherefore, this respondent saith, with great respect, that to hold him accountable as a trustee, or to place him under the stress of a mandamus touching the money held by him precariously, as aforesaid, might be to subject this respondent to a liability for the money which he could only satisfy out of his own private estate." The present Secretary of State is far too intelligent and well informed a person not to know that the relator seeks no such result, and that if a writ of mandamus should be granted, its command would be directed to *the Secretary of State* to pay the money demanded by the relator out of funds held by the Secretary of State officially, and now lying in the State Department as money paid in by Mexico on account of the Weil award. Moreover, how is it possible for the President to withdraw this money at any time from the official custody of the Secretary of State, and thus create for the Secretary the embarrassment and personal liability suggested in the answer? He could not do it without violating provisions of the statute law. Whatever may be the general powers of the Secretary of State over funds paid into his Department under treaties, the uniform pratice of his Department has been, before the Act of June 18, 1878, for the Secretary to receive such money and pay it out to the parties en-

titled to receive it. By the 1st section of the Act of 1878, the *Secretary of State* was authorized and required to receive the installments paid in by Mexico, and distribute and pay it to the parties holding awards. This is the only part of the act that had the force of a law, although it was not necessary. It makes the *Secretary of State*, not the President, custodian of the money; and the only control over it that the President can exercise is when a new treaty has been made, annulling the right of a party who holds an award under the treaty of July 4, 1878, to receive his distributive share of the money paid in by Mexico to meet and satisfy *his award*. There are several provisions of statute law which invest the Secretary of State, as well as other heads of Departments, with authority to do certain acts independent of the President. Of this character is the provision in the Act of June 18, 1878, which authorized the Secretary of State to receive from Mexico the installments paid or to be paid in by Mexico under the requirements of the treaty. The law made the Secretary, not the President, official custodian of the money; and the only power or control over it that the President can exercise comes into force after a new treaty has been made with Mexico, which will have the effect of determining whether Mexico is or is not entitled to expect that the money will be paid back to her. By no possibility can Congress authorize a municipal court of the United States to determine this.

If this part of the respondent's answer was merely intended to suggest to the Court, in a respectful way, proper caution in framing the writ of mandamus, we have no objection to it. The Court is fully apprised by the petition of the relator that he demands payment out of a fund lying in the hands of the Secretary of State, as money which the respondent's answer admits was paid into the Department by Mexico on account of and to satisfy this very award; and

this is the only "stress" under which the mandamus will place the Secretary, or place *Mr. Blaine*. If the mandamus is granted, the President cannot prevent the Secretary from obeying all the command that will be addressed to him, and it is not to be presumed that the President will wish to do so, or will attempt to change the custody of the funds.

There is another part of the respondent's answer, which it may be well to quote in full:

"And, furthermore, this respondent saith, that it would cause an embarrassing conflict of duty to hold him accountable to private parties for a fund which, if the charges and representations aforesaid should be established, it might be the duty of the United States to return to the Republic of Mexico, for in the language of the Chief-Justice in the said case of Frelinghuysen *v.* Key, 'The United States, when they assumed the responsibility of presenting the claims of their citizens against Mexico for payment, entered into no contract obligations with the claimants to assume their frauds and to collect on their account all that, by their imposition and false testimony, might be given in the awards of the commission. As between the United States and the claimants, the honesty of the claims is always open to inquiry for the purposes of fair dealing with the Government against which, through the United States, a claim has been made.'"

No one pretends that the United States assumed or meant to assume to recover a fraudulent claim against Mexico for one of their own citizens. No one denies that, as the Supreme Court held, the honesty of Weil's claim was open to inquiry after the award was made. But open to inquiry how? The Supreme Court said it was open to inquiry *by negotiation between the two Governments*. It never said or intimated that it was open to inquiry by the legislative department of the Government, or by the judicial department. Negotiation between the two Governments was opened by

the proposal of a new treaty, which provided for setting aside Weil's award and having a new trial of his original claim before another international tribunal. The Senate of the United States refused to consent to this. Thereupon the negotiations were at end, and the award was left a final and conclusive adjudication under the treaty of July 4, 1868.

The final plea in the respondent's answer, in the nature of a plea to the jurisdiction of this Court, is as follows:

"And now this respondent, in the light of the matters and things hereinbefore averred and set forth, doth, by way of plea to the whole of the relator's petition, say that the same doth relate to a matter which falls exclusively within the powers and competency of the President of the United States, and this respondent, as subordinate to him, and subject to his direction and control, and which doth in no wise fall within the jurisdiction and competency of the judicial department of the Government of the United States, and that it would involve an interference of the said judicial department with a matter which is exclusively committed by the Constitution to its co-ordinate, the executive department, for this Honorable Court to take cognizance of the matter of the relator's petition."

To this we reply that if it was an official, ministerial act which the relator asked the Secretary of State to perform—and of this the Court must, of course, be satisfied—then it is perfectly within the jurisdiction of this Court to grant the mandamus asked for. What does the respondent mean by his assertion that were the Court to grant the mandamus it would involve an interference by the judicial department in a matter that is exclusively committed by the Constitution to its co-ordinate, the executive department? If this means that under the Constitution the executive department is charged with the execution of a treaty, as a law of the land, it is perfectly correct. But if it means that the executive department can refuse to execute a law which gives a citizen

of the United States a vested right to require the official performance of an executive duty, and that this Court cannot in case of refusal grant a mandamus requiring its performance, it is altogether wrong. The rightful jurisdiction of this Court on the subject of writs of mandamus addressed to executive officers is too familiar to its members to require extended discussion.

SUMMARY.

1. The award made against Mexico in favor of Benjamin Weil remains a final and conclusive adjudication in favor of a citizen of the United States against a foreign government.

2. The United States have not now and never have had any property, right, or interest in the original claim or the award, or in the money paid in by Mexico to meet and satisfy it.

3. The money so paid is by the terms of a statute in the official custody of the Secretary of State. The President of the United States has now no lawful control over it, and never had any lawful control over it, excepting for a temporary purpose during the pendency of a new treaty in the Senate. That control ended when the Senate rejected the new treaty.

4. Congress has no constitutional power to pass the bill now pending in the senate, which undertakes to confer on a municipal court of the United States jurisdiction to set aside the awards in question in a suit or suits instituted in the name of the United States to retry the original claims. This point is taken in case the Court should think it necessary to look at the proposed Senate bill.

The mandamus asked for by the relator should, therefore, be granted.

Respectfully submitted.

By GEO. TICKNOR CURTIS,
A. H. GARLAND,
H. J. MAY,
Of Counsel for the Relator.

WASHINGTON, D. C., *Febr.* 16, 1891.

Office Supreme Court U. S.
FILED,
MAR 9 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, &c.

v.

JAS. G. BLAINE.

No. 1,149.

SUPPLEMENT TO BRIEF FOR PLAINTIFF IN ERROR.

I. As to the character of the claim asserted, see 4 Opinions Attorneys-General, 177, and 13 *Ib.* 19, in connection with authorities on p. 9 *et seq.* of original brief referred to in argument.

II. See U. S. *v.* Schurz (102 U. S. 378) as to jurisdiction to mandamus the officer, where Mr. Schurz claimed (as is here claimed) that the Department desired to do something more as to the land in question; and Marbury *v.* Madison (1 Cr. 137) as to the two kinds of work the Secretary is charged with: one, Presidential and therefor responsible to him, &c.; the other, work placed upon him by law, and therefor he acts for himself and on his own responsibility to the law. See Rev. S. sects. 202 et seq. for duties of Secretary of State.

III. See Ex. Doc. No. 103, 48th Cong., 1st session, p. 22 *et seq.*, for character of the testimony on which the retrial is asked; that is, the witnesses who proved up the claim say they lied and are ready now to swear differently; and for the fact that Mexico had all her testimony when the trial took place and why it was not produced.

IV. See S. R. 712, 46th Congress, 2d session, pp. 1–6, unanimous report of Judiciary Committee, by Senator McDonald, against Congress touching the matter, and H. R. No. 27, of 45th Congress, 2d session, &c., by Mr. Wilson, from Committee on Foreign Affairs, to same effect.

V. See Ex. Doc. No. 140, 49th Congress, 1st session (Senate), Mr. Bayard's letter intimating if that (49th) Congress did not act, the Executive would feel compelled to obey the treaty and pay the money.

VI. Ex. Doc. No. 109, 50th Congress, 1st session, pp. 8 and 9, where Mr. Bayard recommended reference to Court of Claims, which is shown in the original brief cannot be done, and to this extent alone do the two bills go which were before the last Congress and not acted on.

VII. See S. R. No. 2705, 50th Cong., 2d session, p. 911 *et seq.*, testimony of Slaughter, who has an exorbitant contract *to protect the honor of the United States;* and see Minority Report on same, pp. 42–3, 44, *et seq.*, and pp. 83–4 for Slaughter's contract, and other facts; and *Ib.*, pp. 68–9, as to difference between this and the Gardiner claim.

VIII. See Ex. Doc. No. 107, 51st Cong., 1st session, message from President Harrison, with correspondence called for by Senate as to the La Abra claim, and sent without asking or suggesting any legislation, and this is all he has sent, as stated in argument.

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For Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES EX RELATIONE Sylvanus C. Boynton *vs.* JAMES G. BLAINE, SECRETARY OF State of the United States. } No. 1149.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

WM. A. MAURY,
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THE CASE.

This case arises upon the award of the umpire appointed under the treaty of July 4, 1868, between the United States and Mexico, for the adjustment of "claims and complaints" of the citizens of each Government against the other Government which had arisen since the signature of the treaty of Guadalupe Hidalgo of February 2, 1848, by which award the sum of $487,801.68 in Mexican gold was awarded and adjudged against Mexico on

the claim of a certain Benjamin Weil, a citizen of the United States.

The amount thus awarded makes, in United States gold, the sum of $479,975.95, and upon that basis the payments of Mexico and the computations at the State Department have been made.

According to the statement in the respondent's answer (p. 11) there is now in the hands of the President of the United States on account of the award, after all deductions for payments and expenses, the sum of $279,096.32.

The relator, Boynton, claims as an assignee of the award to the extent of $59,561. He has been paid $22,227.36 of that sum, and his pro rata share of the balance in hand, if demandable by him, would be $36,201.63, as stated in the answer (p. 11).

It may be remarked that the amount that has been paid by Mexico on account of the award, including what has been received by the relator, is $171,889.64 (answer, p. 11).

The amount of $279,096.32 has been withheld from distribution because, as the answer states (p. 13), the integrity of the evidence on which the award is founded has been impeached by the Government of Mexico in a way to command the earnest and anxious attention of this Government.

Justice to Mexico requires that it should be stated that the documentary history of what has passed between the two Governments touching the award in question shows that in bringing forward the grounds in support of her charge that the award was the result of false and fabricated evidence she has uniformly disclaimed any purpose

to attack the validity of the award, and has accordingly included it in each installment of the amount awarded, which, we may add, she has paid as it became due.

In taking this course Mexico has simply appealed to the magnanimity and honor of the United States, leaving it entirely to this Government to decide whether it will appropriate or return the fruits of the award if it should be shown that it is based on fraud and corruption.

The grounds on which this appeal is made are so formidable that this Government has felt constrained to refuse to make further payments on account of the award until a satisfactory examination into them can be made.

Although this Government was at first indisposed to entertain the complaints of Mexico, the time soon came when it was no longer possible for it to resist the appeal made to its sense of honor and justice.

Mr. Evarts, then Secretary of State, in his communication to the President of August 13, 1879, says, that the evidence adduced by Mexico has brought "*into grave doubt the substantial integrity of the claim of Benjamin Weil,*" and that "the honor of the United States does require that these two cases (the Weil and La Abra) should be further investigated by the United States to ascertain whether this Government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud" (Senate Report No. 1630, Fiftieth Congress, dated June 20, 1888).

The Foreign Relations Committee of the Senate, in the report just referred to, state that the evidence on which Mexico based her charges of fraud and perjury "estab-

lishes to the satisfaction of the committee that the claim of Benjamin Weil against Mexico upon which an award was made in favor *of the United States*, by the *decision of the umpire selected in accordance with said convention*, has no actual foundation in fact; that it *was originated in fraud and was established by false swearing*" (p. 20). Again, the committee say that "in all points material to make out his claim *Weil and all his witnesses are impeached*, their perjury is established, and their utter *unreliability fully proved; and that the claim from its inception to the present time has been marked by fraud, conspiracy, and corruption, and is entitled to no consideration at the hands of the Government of the United States*" (p. 28).

In his report to the President of 28th February, 1888, touching the impeached awards, Secretary Bayard says:

> It is a remarkable fact that whenever, since the distribution of the Mexican fund was commenced, the deliberate judgment of the officials authorized by Congress to make such distribution has been recorded upon the two awards in question it has uniformly been to the effect that the evidences that the United States, in presenting the claims, had been made the victim of fraudulent imposition were of such a character as to require investigation by a competent tribunal, possessing appropriate powers for that purpose.

In a letter to the Secretary of State, dated March 7, 1887, Hon. O. R. Singleton, of the House Committee on Foreign Relations, says, after explaining why the House had failed to legislate with reference to the awards:

> I desire further to state to you that, as chairman of the subcommittee, to whom was assigned the charge of these cases, I gave them a laborious and careful examination, and I became thoroughly convinced that both of them were absolutely fraudulent and without any merit to recommend them to the favorable consideration of our Government. I earnestly hope, therefore, that you will withhold the payment of the awards until a fair opportunity is afforded Congress to determine what legislation is called for, or until the integrity of the awards are ascertained by a judicial investigation set on foot by the Executive. I am fully satisfied that under

the act of June 18, 1878, and the decision of the Supreme Court in these cases, it is not only within the power, but that it is the positive duty, of the President to withhold payment until Congress shall take further action, or until there is a judicial reëxamination. (Senate Rep. No. 15, 51st Congress, 1st session.)

In the face of all this, it is in vain for the relator to speak disparagingly of the evidence adduced by Mexico in support of her charges. No unbiased mind can deny that it would be derogatory to our national honor to allow another dollar to go into the hands of the relator and the other persons claiming interests in the award until the evidence of fraud shall have been overthrown.

It is but fair to the Executive Department of the Government to say, that if the inquiries necessary to be made to inform its conscience as to the truth of the complaints of Mexico have not been made the failure to make them has been through no fault of that Department.

The Executive, through Presidents Hayes, Arthur, and Cleveland, has repeatedly and with fullness of presentation brought to the attention of Congress the necessity of providing the proper means for making such an investigation into the charges preferred by Mexico as must be made before the Executive can safely act upon those charges. The subject has received much attention from the Committees on Foreign Relations of both Houses, as their elaborate reports show; but the desired legislation has not been furnished, although bills for that purpose are pending.

In 1882 a treaty was negotiated with Mexico, having for its object to reopen the awards in the Weil and La Abra cases; but the Senate, after having had it under consideration for some time, refused to ratify it.

It is, perhaps, best that that treaty was rejected, because it would seem to comport better with the honor and dignity of this Government that it should have under its own control, and should conduct, according to its own methods, any inquiry for the purpose of ascertaining whether its citizens have made it the instrument for committing a great fraud against another Government. By shaping and having under its own control such an investigation the difficulties and embarrassments which might attend an international inquisition into the charges of fraud and perjury would be avoided, and it is more than probable that some such consideration was the cause of the rejection of the treaty. Indeed Mr. Secretary Bayard says, in his communication of February 28, 1888, which accompanied the President's communication to the Senate March 5, 1888, that the rejection of the treaty by the Senate is to be regarded as an approval of Mr. Evarts' opinion that the proposed investigation into the charges of fraud should be made by this government for itself, "as a matter affecting solely its own honor." (Senate Report 15, 51st Congress, 1st session, p. 81.)

Another reason for the action of the Senate may have been the one given by President Hayes for not concluding a treaty with Mexico for the purpose of setting aside the impeached awards and reopening the cases in which they were made, namely, that a treaty having that effect would "*involve an admission by the United States that the results of the convention were not final and conclusive between the two Governments.*" President Hayes, accordingly, strenuously insisted that Congress should provide "for

the further investigation of these claims by some domestic tribunal" (Senate Report 1630, 50th Cong., 1 session, p 23)

It may be stated, also, as a ground on which the treaty may have failed, that it did not provide that, if fraud should be proved in either case, *as to any part of the award*, this Government would at once abandon such award altogether; instead of which the treaty provided that the award should stand as to so much thereof as represented a valid claim. This was hardly in keeping with the honor and dignity of this Government, besides giving countenance to a practice calculated to suggest and encourage fraud and bring settlements by arbitration into disfavor.

The object of the Executive in pressing upon Congress the subject of the award on the Weil claim has not been to have it referred to a tribunal with jurisdiction to determine the validity of the award, but to ask Congress to provide the Executive with the means of making an exhaustive inquiry, by judicial methods, into the question of fraud and perjury in procuring the award; an inquiry which would be entirely consistent with the validity of the award in point of law, as it is for the purpose of enabling the Executive to determine whether it should use its legal advantage or not to the prejudice of a friendly power.

It is too apparent to need discussion that the Executive, under existing laws, is powerless to enter upon such an investigation as the charges of Mexico demand, and it would be almost useless, and extremely unfair and disrespectful

to Mexico for the Executive to undertake an investigation before Congress shall have provided adequate means for doing so. This has been the opinion of the various high functionaries whose duty it has been, from time to time, to deal with this subject. They have been oppressed by a sense of the duties and responsibilities that rest on the United States in the premises and of their own powerlessness to meet those duties and responsibilities without the assistance of Congress.

On August 13, 1879, Mr. Evarts, then Secretary of State, wrote the President that "The Executive Government is not furnished with the means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses. *The authority for such an investigation must proceed from Congress.* I would advise, therefore, that the proofs and conclusions you shall come to thereon, if adverse to the immediate payment on these awards of the installments received from Mexico, be laid before Congress for the exercise of their plenary authority in the matter." (Senate Report No. 1630, Fiftieth Congress, first session, p. 22.)

In this way there has been delay in Executive action, but that delay has been plainly unavoidable, and can not be urged as a valid reason for applying to the judicial department to compel the Executive to make the desired distribution without the investigation which the national honor calls for.

It is a grave mistake to say that the course taken by the Executive is incompatible with the finality of the award as the judgment of a court of exclusive jurisdiction.

Whether the award may be said to be in favor of Benjamin Weil or "in law and in fact an award to the United States against Mexico," as was held by the Foreign Relations Committee of the Senate (Senate Report No. 1630, Fiftieth Congress, first session, p 25), is immaterial, because, so long as any duty of the United States remains to be performed with regard to the award, it is, necessarily, subject to such control and authority of the Executive as may be necessary to protect that department from being made an instrument for enforcing against a friendly power performance of an award obtained by the fraud and perjury of our own citizens.

It is upon the ground of this relation held by the United States to the award in question that Mexico has made her complaints of fraud to this Government alone, without having any regard to the several persons who have succeeded to Weil's interest in the award, and it is upon the same ground that the United States is considering whether it will refuse to receive satisfaction of the award; and this Government has not been able to see that Benjamin Weil, in his lifetime, or those claiming under him since his death, had or have any such interest in the premises as entitled him or entitles them to be consulted as to the course to be taken with reference to the complaint of Mexico.

Looked at from this the true point of view, there is no reason whatever for the repeated imputations on the Executive and Congress of wishing to trample under foot the judgment of a court of exclusive jurisdiction protected by unusually solemn sanctions.

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Does the principle of *res judicata*, it may be asked, compel the United States to appropriate the fruits of an award steeped in iniquity, or debarth at Government from refusing to take advantage of a legal right obtained by crime, whether such right will benefit itself or one of its citizens?

It is true that the attempt of the United States and Mexico to provide by a new treaty for a reëxamination of the Weil and La Abra cases *by another international tribunal* failed through the refusal of the Senate to concur in *that mode of adjustment*, but can it be said with any show of reason that the *mere fact* of the rejection of this treaty, negotiated with a view to a particular mode of passing upon the charges preferred by Mexico, *is to be regarded as the judgment of the Senate that the charges themselves are groundless?* Because the Senate rejected the treaty negotiated by President Arthur, it is said that the impeached awards, which have been stigmatized by every officer and Congressional committee who have looked into them, should be recognized as valid and beyond reproach. In short, that in the presence of all the shocking evidence placed by Mexico before the President he must shut his eyes and tell Mexico that he sees nothing of which his Government should be ashamed!

Supposing, now, that all the undistributed money should be paid under the stress of writs of mandamus, would it not be a humiliating confession of weakness for the United States to urge, as a reason for not giving proper attention to the charges made by Mexico, that the moneys to which those charges relate had been taken from the hands of its

Executive, against its will, by legal process sued out of its own courts by its own citizens? It is difficult to believe that any court would allow itself to be made instrumental in driving this Government to assume such an attitude of abject helplessness before the other great powers of the world.

In December, 1881, the Mexican minister, in a communication to the Secretary of State, expressed his unwillingness to suppose "the political mechanism of a country to which many others turn their eyes as to a model to lack the means of frustrating a great fraud originated to the detriment of a friendly nation which is sparing no pains to fulfill its obligations toward the United States," and the umpire under the treaty, Sir Edward Thornton, said he doubted whether either Government "would insist upon the payment of claims shown to be founded upon perjury." And it now remains to inquire whether the Mexican minister might not have truly said that our "political mechanism" was wanting in the particular he mentions, and whether the umpire was not mistaken in supposing that, if it should turn out that the award was obtained by perjury, this Government had the power to refuse to be instrumental in collecting the fruits of the crime of its own citizens. The stress of the case is just here.

ARGUMENT.

THIS WRIT OF ERROR CAN NOT BE MAINTAINED WITHOUT AN INVASION OF EXECUTIVE DISCRETION.

I.

As the answer shows, it is the deliberate opinion of the President and the Secretary of State that the honor of the United States requires that no more payments should be made to the persons claiming interests in the Weil award until the charges of fraud and perjury in obtaining that award shall have been shown to be unfounded.

It sufficiently appears that the Executive can not make a satisfactory investigation into these charges until Congress shall have provided the means for conducting such an investigation, and that the delay complained of is not owing to any absence of diligence on the part of the Executive, but to the difficulty of getting the action of Congress. This is stated, not because it is supposed to be a subject for judicial inquiry, but because it is desired that the court should know that there is no disposition on the part of the Executive to retain this money unnecessarily.

The question presented, then, is whether the Judicial Department of the Government has the power, in this condition of things, to coerce the distribution of this money by mandamus, in the face of the determination of the Executive to withhold distribution for the reasons stated.

When a government is applied to by one of its citizens to urge his claim against another power there can be no doubt that such government may undertake the prosecution of the claim or not, as it may see fit. And it would

seem to be equally clear that if a government undertake the prosecution of such a claim it may abandon the prosecution of it at any time and leave the citizen to such rights and remedies as he may have.

In every case the government is the *exclusive* judge whether it will prosecute or whether it will withdraw its support from a claim. In the nature of things this must be so or governments would be constantly involved in the frauds of their citizens and the peace of nations might, sometimes, be jeoparded by the dishonesty of a single invidual.

Why this well established principle is not applicable to the award on the Weil claim it is difficult to comprehend. Certainly Weil had no right to compel the United States to demand satisfaction of his claim from Mexico. Had he or have those claiming under him any right to prevent the United States from withdrawing from all connection with the claim at any time and so long as anything remains to be done by that government in connection with it?

If this Government should have reason to conclude, after such an examination into the evidence as its honor and a proper consideration for the Republic of Mexico demand, that the award rests on fraud and perjury, has it not a right to say to the claimants that it will not be instrumental in paying them another dollar? Granting, for the sake of argument merely, that the award stands as a final judgment in favor of Weil and those who stand in his shoes, can it be said that the United States would be guilty of trampling that judgment under foot simply by refusing to be any longer instrumental in obtaining satisfaction of it?

By declining to aid these claimants further in getting the fruits of that judgment the United States would interfere with no vested right of theirs, unless they have a vested right to the active aid of this Government in collecting the amount of a final award which is polluted by perjury.

It is to be observed that the treaty of 1868, unlike some other treaties of the same class, contains no provision requiring either Government receiving money from the other Government to distribute it among the parties claiming to be entitled to it.

By article II of the treaty all claims of the citizens of each Government are to be presented by the agent appointed to represent it before the Commission, and each Government thereby becomes responsible through its agent for the integrity of the proceedings in each case, the claimants themselves or their private counsel having no standing whatever before the Commission.

The United States became as much responsible for the integrity of each case it laid before the Commission as though the claim was its own, and became invested, necessarily, with all the power over each claim that might be necessary to enable it to discharge its whole duty to Mexico. The Supreme Court say, in *Frelinghuysen* v. *Key* (110 U. S, 63.):

> **The presentation by a citizen of a fraudulent claim or false testimony for reference to the Commission was an imposition on his own Government, and if that Government afterwards discovered that it had in this way been made an instrument of wrong towards a friendly power, it would be not only its right, but its duty, to repudiate the act and make reparation as far as possible for the consequences of its neglect, if any there had been. International arbitration must always proceed on the principles of national honor and integrity. Claims presented and evidence submitted to such a**

tribunal must necessarily bear the impress of the entire good faith of the Government from which they come, and it is not to be presumed that any Government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding. No technical rules of pleading as applied in municipal courts ought ever to be allowed to stand in the way of the national power to do what is right under all the circumstances. Every citizen who asks the intervention of his own Government against another for the redress of his personal grievances must necessarily subject himself and his claim to these requirements of international comity. None of the cases cited by counsel are in opposition to this. They all relate to the disposition to be made of the proceeds of international awards after they have passed beyond the reach of the Governments and into the hands of private parties. The language of the opinions must be construed in connection with this fact. The opinion of the Attorney-General in Gibbes' case (13 Op., 19) related to the authority of the executive officers to submit the claim of Gibbes to the second commission after it had been passed on by the first, without any new treaty between the Governments to that effect, not to the power to make such a treaty.

To this may be added the following from the opinion of the Court of Claims in *Great Western Ins. Co.* v. *U. S.* (19 C. C. R., 217; S. C, 112 U. S., 193):

When the National Government urged upon Great Britain the demands of American citizens on account of the depredations of the rebel cruisers, those demands became reclamations by the sovereignty of this nation against the British sovereign, and passed out of the region of mere private right into the domain of international law, and out of the hands of the citizens into those of his Government.

When they so passed, the authority of the National Government over them became immovable and supreme, *not only as between it and the citizen,* but as between it and Great Britain. If not so, it was impossible for the United States to have treated honorably with Great Britain in regard to them; for it was Great Britain's high and undoubted right to know that the United States had sovereign power, absolute and unimpeachable, to do what they saw fit in regard to the claims which were the subject-matter of the treaty, and that there was nothing behind to impair or weaken that power.

All this would seem to follow from the admission in the relator's brief that it is competent for the United States and Mexico to annul by treaty stipulation the award or judgment claimed to be in favor of Weil *without his consent.* All that is necessary to contend for here is that the United States can, if the charges are made good by

Mexico, return the money in its hands to that power, and leave the claimants to get satisfaction of the award in any way that is open to them.

But it is said that the rejection of the treaty of 1882 by the Senate, with the evidence in support of the charges of fraud and perjury before it, is the decision of that body that the charges were not supported, and that the honor of the country is fully vindicated, and that all that is left is a purely ministerial duty to pay the money.

If the rejection of the treaty was on the ground that the Senate was of opinion that the charges were baseless, it is remarkable that, as we have seen, the Senate Committee on Foreign Relations, in 1888, some time after the rejection of the treaty by the Senate, reported to the Senate that "*Weil and all his witnesses are impeached, their perjury is established, and their utter unreliability fully proved.*" (*Supra.*)

It is not complimentary to the Senate to say that their rejection of the treaty compels the conclusion that they deemed the evidence adduced by Mexico unworthy of attention, when several Presidents and Secretaries of State, and the Senate Committee on Foreign Relations have been deeply impressed, not to say convinced by that evidence.

This of itself shows that the Senate could not have proceeded on the ground attributed to it, but must have been swayed by other considerations, as has been already stated and need not be repeated, and justifies the assumption of Secretary Bayard, in the communication above referred to, that the rejection of the treaty was in no sense an expression of opinion adverse to the investigation of the charges with reference to the impeached awards.

But how can it be said that, because the Senate refused to ratify a treaty setting the award aside, the Executive is not at liberty to withdraw its aid and countenance from that award and leave the parties themselves interested in it to collect what remains due? It is not perceived that it is necessary to abrogate the finality clause of the treaty of 1868 in order to enable the Executive to refuse its aid to the claimants *and leave them to enforce their final judgment in any way they can.* There is nothing in such a course that would be inconsistent with the inviolability of the award, so far as we are able to see.

What, then, remains of the argument that the Executive is attempting to violate a solemn judgment by soliciting Congress to give it the necessary means for inquiring into the charges preferred by Mexico in order that it may determine whether to abandon further connection with the impeached award or not?

Furthermore, it is not perceived how the failure of the treaty-making power to act, by the rejection of the treaty, has had the effect of hampering or concluding the President as to duties that *belong to him alone*, and with which the Senate have nothing to do. In what way can the Senate interfere with such duties? What relevancy has the action or non-action of the Senate to such duties? We confess we do not see the force of the argument of the relator on this point. We do not see what the finality clause of the treaty or the sanctity of judgments have to do with the case, inasmuch as the Executive does not propose to interfere with either, should it determine to refuse

any further assistance to the parties interested in the award.

It would be a waste of time to argue that the question whether the Government shall give its support to a private claim against another nation or withdraw that support is, under the Constitution, left to the exclusive discretion of the Executive.

The answer shows that the President has determined, upon the evidence before him, that no more money should be distributed under the Weil award until the charges of fraud and perjury can be properly investigated, and the important inquiry arises whether the judicial department of the Government has authority to review the premises upon which the President has acted and substitute its discretion for his.

II.

Mandamus can not be maintained, for the further reason that the fund in question is in the hands of the President of the United States. This is unavoidably the case, under the Constitution.

Under the power granted by the Constitution to the Executive "to receive ambassadors and other public ministers" (art. 2, sec. 3), the President is, as Mr. Jefferson declared, "the only channel of communication between the [this] country and foreign nations" (Whart. Dig. Int. Law, § 79, p. 586, 2 ed.). It was, therefore, by the President alone that the money paid, from time to time, by Mexico could have been received, and it is in his hands,

and not in those of the Secretary of State, that such of the money remains as has not been distributed.

To say that this undistributed money is in the keeping of the Secretary of State, is to ignore the proper relations of that officer to the President. He is the mere hand of the President, and, like an ordinary agent, his possession of the money is that of his principal, the President, who may at any moment deprive him of all control over it; and what the Roman jurists say of the possession of depositaries and hirers is perfectly applicable to the Secretary of State, namely, that they do not possess, *they are only in possession, non possident, sunt tantum in possessione.* As Ulpian says, it is one thing to possess but a vastly different thing to be in possession, "*aliud est possidere, longe aliud in possessione esse.*"

This relation between the Secretary of State and the President is fixed by the Constitution and *can not be changed by Congress, or the courts.* It is founded in the fundamental distribution of powers among the three coordinate departments of the Government.

In U. S *ex rel. White* v. *Bayard* (127 U. S, 250) this very point was raised; and, although it was not necessary to decide it, the court notice its importance, by remarking:

> We express no opinion as to the validity of the second ground of defense set up in the answer, that the Secretary of State is not invested with authority over the moneys in question independently of the President, and that it is the opinion of the President that the public interests forbid the making of payments to White, in the condition of things set forth in the answer.

Besides the power "to receive ambassadors and other public ministers" the Constitution, amongst others, confers

on the president the power to be "Commander-in-Chief of the Army and Navy."

In establishing the State, War, and Navy Departments Congress has been attentive to the fact that the powers chiefly appertaining to the functions of these Departments are vested in the President by the Constitution and not subject to legislative control. Accordingly, Congress has declared, in defining the duties of the heads of these Departments, that *they shall be such only as the President himself shall prescribe.*

As to the duties of the Secretary of State Congress says:

> The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign States or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department; and he shall conduct the business of the Department in such manner as the President shall direct. (R. S., § 202.)

With reference to the duties of the Secretaries of War and the Navy, Congress has declared as follows:

> The Secretary of War shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to military commissions, the military forces, the warlike stores of the United States, or to other matters respecting military affairs; and he shall conduct the business of the Department in such manner as the President shall direct. (R. S., § 216.)
>
> The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment. (R. S., § 417.)

But when Congress came to prescribe the duties of the Secretaries of the Treasury, of the Interior, and of Agriculture, the Postmaster-General, and the Attorney-General

it specified what they should be, Congress not being restricted by the Constitution, in those instances, as it is in the cases of the three other Departments.

It is not denied that Congress may lay the heads of the State, War, and Navy Departments under determinate duties, amounting to commands to do certain things, but such duties must always relate to matters which Congress may, under the Constitution, commit to the hands of the officers last mentioned, *and not to duties appertaining to the President alone.*

Chief-Justice Marshall, speaking of the head of the Department of Foreign Affairs, as the Department of State was then called, in *Marbury* v. *Madison*, says, "He is to conform precisely to the will of the President, he is the mere organ by whom that will is communicated. *The acts of such an officer can never be examinable by the courts.*" Again he says:

> *The conclusion from this reasoning is, that where the heads of Departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.* (1 Cr., 166.)

It is not perceived, therefore, that there is any possible way by which the judicial department of the Government can fasten a duty on the Secretary of State to pay the relator money that is possessed by the President and subject to his discretion and control, especially when the Secretary has said in his answer that the President has ordered him not to pay it.

This application of the relator for a mandamus is nothing less than an invitation to this court to take out of

the President's hands a matter committed to his exclusive charge by the Constitution, and apply to that matter its judgment and discretion. In a word, the relator's object is to substitute judicial discretion, which the Constitution does not contemplate, for Executive discretion, which the Constitution does contemplate. "One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." (*Sinking-Fund Cases*, 99 U. S., p. 718.)

THE ACT OF JUNE 18, 1878.

It is sought to evade this difficulty by the argument that the act of June 18, 1878 (20 Stat., 144), has made the Secretary of State the depositary and custodian of the fund.

We can not accept this view of the statute; first, because we deny the power of Congress to take the fund paid by Mexico under the awards out of the hands of the President, where the Constitution places it, and make the Secretary of State its custodian. The argument on this proposition needs not to be repeated. Secondly, the statute admits of no such meaning, supposing that Congress had the authority to pass such a law.

It is to be observed that there was a complete harmony of opinion between the Congress that passed the act of 1878 and the President as to the course to be taken with reference to the impeached awards. The President had communicated to Congress his opinion that the honor of this country required that no more payments should

be made on those awards until the charges preferred by Mexico had been investigated and found without support, and Congress expressly concurred in that view in the fifth section of the act of 1878.

Now, to hold that Congress intended, by the act of 1878, to take the fund from the President's control is little short of holding that Congress, by enacting that law, voted a want of confidence in the person who then filled the office of President. There does not appear to be any escape from that conclusion.

This court has repeatedly said that it will not take the language of a statute in a harsh or unreasonable sense unless required to do so by a clear expression of the legislative will. (*Chew Heong* v. *United States*, 112 U. S., 536; *Blake* v. *U. S.*, 103 U. S., 227; *United States* v. *Kirby*, 7 Wall., 482; *United States* v. *Jones*, 131 U. S., 1.)

Turning now to the several sections of the act of 1878, there does not appear to be anything in them that indicates a purpose to withdraw the fund from the custody and control of the President, for, as this court say in *Frelinghuysen* v. *Key*, "IT [Section 1] DOES NOT UNDERTAKE TO SET ANY NEW LIMITS ON THE POWERS OF THE EXECUTIVE;" and in another part of the same opinion the court say that, pending the negotiations with Mexico, *the President* "may properly *withhold* from the relators their distributive shares of the moneys *now in the hands of the Secretary of State*," showing, clearly, that *the court regarded the moneys as still under the control of the President, notwithstanding the act of* 1878. If the court had regarded the statute as transferring the moneys to the control of the Secretary of

State, it would hardly have said that *the President* had the power to withhold them pending the negotiations.

But the statute itself is its best expositor. The fifth section requests the President to investigate any charges of fraud as to the Weil and La Abra awards, and, in case he comes to the conclusion that the said cases, or either of them, should be reopened and retried, declares that "it shall be lawful for *him* to withhold payment of said awards, or either of them, until," etc. If Congress had intended to put the Secretary of State in control of the fund it would hardly have declared that the *President*, and not the Secretary, should withhold payment of the awards.

The first section of the act is relied on to show a purpose to put the fund under the full control of the Secretary of State, but that it had no such effect is shown by the already-quoted remark of this court, in the case above mentioned, that this first section "*does not undertake to set any new limits on the powers of the Executive.*"

Indeed, the history of the act of 1878 shows this. That act was framed at the solicitation first of Mr. Fish, and next of Mr. Evarts, as Secretaries of State. As the following letter from Mr. Evarts shows, the necessity for the legislation asked for was to obtain an appropriation to make good to the fund awarded to our citizens the amount deducted by Mexico as the amount awarded to citizens of Mexico, and also to obtain from Congress a rule of action in respect of the satisfaction of the expenses of the commission.

DEPARTMENT OF STATE,
Washington, November 6, 1877.

SIR: I have the honor to invite the attention of your honorable committee to the necessity of immediate legislation to enable the prompt payment of the awards in favor of our citizens, under the convention of July 4, 1868, between the United States and Mexico.

On the 31st of January last, in due observance of the terms of the convention, and of the subsequent agreements and protocols, the Mexican Republic paid to the United States a certain sum in satisfaction of the first installment then due. The actual amount then received from Mexico was $242,501 in coin, explained as follows:

Amount due at first installment	$300,000.00
Less balance in favor of Mexico on adjustment of joint expenses of the commission, as shown in the statement annexed to the protocol of December 19, 1876, and accordingly withheld by Mexico	57,499.01
Balance	242,500.99

The distribution of this sum, at least, has been urgently pressed on this Department, without waiting for the appropriation by Congress of the sum assumed by the Government of the United States according to the terms of the convention, to wit, the sum of awards in favor of Mexican citizens against the Government of the United States. This sum, in pursuance of the convention, is withheld by Mexico from the aggregate awards in favor of our citizens. No doubt the prompt distribution of money awarded to our citizens, and paid over to the Government of the United States for that purpose, is an obligatory duty which this Government should be most anxious to discharge. All delay is at the cost of the claimants, as the Government does not charge itself with interest on the money in its hands. In the present case, I am informed that many of the claimants are needy, and that there is danger that their necessities may expose them to much greater loss than that of interest.

I have, however, hesitated to make this distribution of the money on hand, which would be according to the practice of the Government, because of some legislation being necessary to make good to the fund the amount with which the Government of the United States is chargeable, and because it is desirable that the form and manner of the reservation from the installment in hand of the expenses of the Government should now be settled. Besides, my predecessor had submitted a bill to carry out these purposes to the last Congress, which passed the House unanimously and received the approval of the Committee on Foreign Relations and of the Judiciary of the Senate. The final passage of the bill in the Senate was arrested in the last days of the session by a suggestion that evidence might be presented that two of the awards were based upon fraudulent testimony, and that some delay should be allowed for that reason.

Since that time the Mexican Government has simply presented, in a pamphlet form, the motions made for a rehearing before the umpire (Sir Edward Thornton) in the cases of Benjamin Weil and of La Abra Mining Company, adding thereto the correspondence between the Mexican minister, Don Ignacio Mariscal, and my predecessor, Mr. Fish, in reference

to these two cases. These motions were denied by the umpire, and these awards, standing upon the same footing of finality under the convention with all the others, are awaiting distribution.

In a communication accompanying these pamphlets, Señor Cuellar, the Mexican chargé d'affaires *ad interim*, states that the object of this appeal of his Government is "not to prevent the payment of the awards made by the umpire in the now extinct mixed claims commission, but only in the interest of rectitude and justice, to render manifest the fraud committed by the parties interested."

I beg leave to inclose a copy of the bill of the last session, and to ask that it may be promptly considered, that this Department may be relieved from the importunities of the claimants, an installment on whose awards is now in the hands of the Government of the United States.

I have the honor to be, sir, your obedient servant,

WM. M. EVARTS.

HON. THOMAS SWAN,
Chairman of the Committee on Foreign Relations,
House of Representatives.

Mr. Evarts was too enlightened a lawyer to think that there was any necessity to resort to Congress for authority to the President to distribute the money awarded, and, consequently, he asks for no such authority.

Nor does it seem reasonable to suppose that Congress, in extending the first section of the act to the subject of distribution, intended to do more than it did by the fifth section, which the court said was a mere request from Congress to the Executive, and related to a matter over which the latter had complete authority without the statute.

Indeed, there is an insuperable difficulty in holding that the act of 1878 had any such effect as to put the Secretary of State beyond the control of the President as to the moneys paid by Mexico in satisfaction of the awards, because that view of the statute requires that it should be held to have repealed by implication section 202, Revised Statutes, with which the interpretation contended for is *in direct antagonism.* Section 202 is as follows:

The Secretary of State shall perform such duties as shall, from time to time, be enjoined on or intrusted to him by the President relative to corre-

spondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, *or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department, and he shall conduct the business of the Department in such manner as the President shall direct.*

Now, repeals by implication are not favored (*Red Rock* v. *Henry*, 106 U. S., 596, and cases cited), nor is it at all probable that Congress intended to make so radical a change in a law that has stood unchanged from the founding of the Government merely for the purpose of taking from the Executive control over the money paid on these Mexican awards.

III.

But supposing the act of 1878 did have the effect of making the Secretary of State the custodian of the moneys paid by Mexico to satisfy the awards against her, it is not perceived how the door is thereby opened for granting a mandamus in this case, unless it should be held that Congress intended to place the Secretary of State under the stress of an absolute command to make distribution of the fund in case this Government and Mexico should fail to conclude a treaty to reopen and retry the two cases, and unless it should furthermore be held that Congress intended that the Secretary of State should be powerless to protect his Government from being made instrumental in procuring the payment of awards that should prove to have been procured by fraud and perjury.

Now we are unable to comprehend how such an intention could be attributed to Congress.

It is true that when the act of 1878 was passed it was supposed that a way out of the embarrassment in which this Government found itself would be afforded by the negotiation of a new treaty setting aside the awards and providing for a new trial of them, but what warrant is there for saying that Congress intended, if no treaty should be made, to deprive the Secretary of State of the power to adopt any other recognized mode of relieving his Government from its embarrassment that could be adopted without violating the sanctity of the two awards.

Annulling the awards by treaty was one way; but it was not the only way out of the difficulty, as was evidently the opinion of this court in *Frelinghuysen* v. *Key*, where it says that "as between the United States and Mexico the awards are final and conclusive until set aside by agreement between the two Governments OR OTHERWISE."

Was the Secretary then bound to imperil our amicable relations with Mexico, by ignoring her charges and confessing that Congress had deprived him of the power to save his country from the contamination of further connection with awards which he believed to be steeped in crime? What an attitude for a great government to take!

It may be stated as well here as anywhere else that the view advanced that the Supreme Court decided in *Frelinghuysen* v. *Key* that there was no course open to the Executive for the protection of the national honor except by making a new treaty with Mexico, can not be sustained. The question in that case was whether payment of the awards could be compelled while this Government and

Mexico were negotiating with reference to the awards, and the court, *confining its opinion to the case before it*, adjudged that, while those negotiations were going on, payment could not be compelled.

It is therefore gratuitous to say that the court also decided that the negotiations then on foot were the only means of meeting the difficulty that was embarrassing our Government. If that is so, what did the court mean when it said that the awards under the treaty of 1868 might be set aside "by agreement between the two Governments *or otherwise?*"

I am aware that the learned counsel for the relator conveniently disposes of the words "*or otherwise*" by saying that what they import is merely *obiter dictum;* but we apprehend that they are too closely connected with the point in judgment to be let down the wind in that way.

The strong terms in which the Chief Justice speaks of the duty of a government to prevent itself from being made instrumental in carrying out the frauds of its citizens against another government make it necessary and just to restrict the language of the opinion to the case actually before the court. As the learned counsel opposite himself insists, the opinion of the court must be read in the light of the particular facts with which it was dealing. The learned Chief Justice never could have meant that if the treaty failed before the Senate, this Government was bound to be instrumental in obtaining payment of awards which it might be satisfied had been made on the testimony of perjured witnesses.

IV.

The learned counsel for the relator is in error when he says, in a tone which savors of animadversion, that the respondent in his answer asks the court to wait until he can obtain legislation to cut down the claimant's rights. Nothing of the kind appears in the answer. All that is there said is that the Executive has not the means to conduct an adequate investigation, and must appeal to Congress for those means.

His predecessors had said the same thing, as we have shown, and the Supreme Court concur in that view in *Frelinghuysen* v. *Key*, where they say that "the report of Mr. Evarts can not be read without leaving the conviction that *if the means had been afforded*, the inquiries which Congress asked for would have been further prosecuted."

In its condition of helplessness, which this court recognizes in the quotation just made, what was the Executive to do but await the action of the legislative department of the Government?

Again, it may be asked what has the Executive to do with the character of such legislation as has been proposed? It has asked for the means of making a proper investigation, but if Congress, in furnishing those means, should go further and provide for vacating the awards, is that a matter which the Executive can control? Does it follow that, if Congress should, by such legislation, act beyond its powers, as is contended, the Executive would be any the less able to dissolve its connection with the awards, if the charges of Mexico should be proved, and

leave the claimants to such rights as they have by virtue of the adjudication of the commission—rights which would not be affected by any legislation that might be invalid?

If any domestic court should decide that the awards were the results of perjury and fraud, that would be a sufficient basis for Executive action; and it would be entirely immaterial to the Executive if such court went further and adjudged the awards void, because what the vindication of the honor of this country and the application of Mexico would in that event require are merely that this Government should cease to be instrumental in enforcing the awards and no more.

It is evident, therefore, that the learned counsel for the relator misapprehends the position taken by the respondent and that his attention has been unnecessarily directed to an exposition of the judicial power under the Constitution.

If, as is admitted by counsel, the United States has authority to agree by treaty with Mexico to set aside the awards, has not the United States the right, through its Executive, to refuse to have anything more to do with their payment?

V.

But suppose a mandamus should be awarded, and the President should deem it his duty to withdraw the fund from the respondent's hands? Would that fact suffice to purge the apparent contempt of disobeying the writ? How could it have that effect? And what alternative

would the respondent have to paying *de bonis propriis* the amount named in the writ? The counsel for the relator says he can hardly observe a "becoming seriousness" in treating this point, but, unfortunately, he seems to misapprehend its bearing. As, however, we do not think it will become a practical question in the case, we forbear to discuss it.

VI.

It is unnecessary to inquire whether the award in question was in favor of the United States, in order to establish the proposition that it is under the absolute control of the Executive. The Senate Committee on Foreign Relations thought it was an award in favor of the United States, as we have seen, and this Court say, in *Frelinghuysen* v. *Key* (*supra*):

> * * * * Thus while the claims of the individual citizens were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much *was due from one government to the other* on account of the demands of their respective citizens.

See also the cases of *Rustomjee* v. *The Queen* (1 Q. B. D., 487; S. C. 2 Q. B. D., 69) and *Burnand* v. *Rodocanachi* (5 C. P. D., 424; S. C., 6 Q. B. D. (C. A.) 633, and 7 Appeal Cases).

We respectfully submit that the records presents no case for a mandamus.

Wm. A. Maury,
Assistant Attorney-General.

APPENDIX.

ACT OF JUNE 18, 1878.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State be, and is hereby, authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States and the Mexican Republic for the adjustment of claims concluded July fourth, eighteen hundred and sixty-eight, and April twenty-ninth, eighteen hundred and seventy-six, and whenever and as often as any installments shall have been paid by the Mexcian Republic on account of said awards to distribute the moneys so received in ratable proportions among the corporations, companies, or private individuals, respectively, in whose favor awards have been made by said Commissioners or by the umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto. And in making such distribution and payment due regard shall be had to the value at the time of such distribution of the respective currencies in which the said awards are made payable; and the proportionate amount of any award of which, by its terms, the United States is entitled to retain a part shall be deducted from the payment to be made on such award, and shall be paid into the Treasury of the United States as a part of the unappropriated money in the Treasury.

SEC. 2. That out of any moneys in the Treasury not otherwise appropriated a sufficient sum is hereby appropriated to enable the Secretary of the Treasury to pay to the Secretary of State of the

United States, in gold or its equivalent, the equivalent of fifty thousand five hundred and twenty-eight dollars and fifty-seven cents in Mexican gold dollars, and ten thousand five hundred and fifty-nine dollars and sixty-seven cents in American gold coin, and eighty-nine thousand four hundred and ten dollars and seventeen cents in United States currency, said sums being the aggregate in said currencies respectively of the awards made under the said convention of July fourth, eighteen hundred and sixty-eight, in favor of citizens of the Mexican Republic against the United States, and having been deducted from the amount awarded in favor of citizens of the United States, and payable to Mexico, in accordance with article four of said treaty; and that said sums, when paid to the Secretary of State, as aforesaid, shall be regarded as part of the awards made under the said treaty, to be paid or distributed as herein provided.

SEC. 3. That out of the payments and installments received from Mexico, as aforesaid, on account of said awards, and out of the moneys which shall be received by the Secretary of State under the provisions of this act, the Secretary of State shall, when and as the same shall be received and paid, and before any payment to claimants, deduct therefrom and retain a sum not to exceed five per centum of said moneys awarded to citizens of the United States, until the aggregate of the amounts so deducted and retained shall equal the sum of one hundred and fourteen thousand nine hundred and forty eight dollars and seventy-four cents, being the amount of the expenses of the Commission, including contingent expenses paid by the United States in accordance with article six of the treaty, as ascertained and determined in pursuance of the provisions of the said treaty; which said sums, when and as the same are deducted and retained, shall be, by the Secretary of State, transmitted to the Secretary of the Treasury, and passed to the account of and be regarded as unappropriated money in the Treasury.

SEC. 4. That in the payment of money, in virtue of this act, to any corporation, company, or private individual, the Secretary of State shall first deduct and retain or make reservation of such sums of money, if any, as may be due to the United States from any corporation, company, or private individual in whose favor awards shall have been made under the said convention.

SEC. 5. And whereas the Government of Mexico has called the attention of the Government of the United States to the claims hereinafter named with a view to a rehearing, therefore be it

enacted that the President of the United States be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican Government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law, or considerations of justice and equity require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct. And in case of such retrial and decision any moneys paid or to be paid by the Republic of Mexico in respect of said awards, respectively, shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified, or affirmed as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them. (20 Stat., 144.)

CONVENTION OF JULY 4, 1868, FOR THE SETTLEMENT OF CLAIMS BETWEEN THE UNITED STATES AND MEXICO.

Whereas it is desirable to maintain and increase the friendly feelings between the United States and the Mexican Republic, and so to strengthen the system and principles of republican government on the American continent; and whereas since the signature of the treaty of Guadalupe Hidalgo, of the 2d of February, 1848, claims and complaints have been made by citizens of the United States, on account of injuries to their persons and their property by authorities of that republic, and similar claims and complaints have been made on account of injuries to the persons and property of Mexican citizens by authorities of the United States; the President of the United States of America and the President of the Mexican Republic have resolved to conclude a convention for the adjustment of said claims and complaints, and have named as their plenipotentiaries the President of the United States; William H. Seward, Secretary of State; and the President of the Mexican Republic, Matias Romero, accredited as envoy extraordinary and minister plenipotentiary of the Mexican

Republic to the United States, who, after having communicated to each other their respective full powers, found in good and due form, have agreed to the following articles:

ARTICLE I.

All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of the Mexican Republic arising from injuries to their persons or property by authorities of the Mexican Republic, and all claims on the part of corporations, companies, or private individuals, citizens of the Mexican Republic, upon the Government of the United States arising from injuries to their persons or property by authorities of the United States, which may have been presented to either Government for its interposition with the other since the signature of the treaty of Guadalupe Hidalgo between the United States and the Mexican Republic of the 2d of February, 1848, and which yet remain unsettled, as well as any other such claims which may be presented within the time hereinafter specified, shall be referred to two Commissioners, one to be appointed by the President of the United States, by and with the advice and consent of the Senate, and one by the President of the Mexican Republic. In case of the death, absence, or incapacity of either Commissioner, or in the event of either Commissioner omitting or ceasing to act as such, the President of the United States or the President of the Mexican Republic, respectively, shall forthwith name another person to act as Commissioner in the place or stead of the Commissioner originally named.

The Commissioners so named shall meet in Washington within six months after the exchange of the ratifications of this convention, and shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to public law, justice, and equity, without fear, favor, or affection to their own country, upon all such claims above specified, as shall be laid before them on the part of the Governments of the United States and of the Mexican Republic, respectively; and such declaration shall be entered on the record of their proceedings.

The Commissioners shall then name some third person to act as an umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person, and in each

and every case in which the Commissioners may differ in opinion as to the decision which they ought to give, it shall be determined by lot which of the two persons so named shall be umpire in that particular case. The person or persons so to be chosen to be umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall already have been made and subscribed by the Commissioners, which shall be entered on their record of their proceedings. In the event of the death, absence, or incapacity of such person or persons, or of his or their omitting, or declining, or ceasing to act as such umpire, another and different person shall be named, as aforesaid, to act as such umpire, in the place of the person so originally named, as aforesaid, and shall make and subscribe such declaration as aforesaid.

ARTICLE II.

The Commissioners shall then conjointly proceed to the investigation and decision of the claims which shall be presented to their notice, in such order and in such manner as they may conjointly think proper, but upon such evidence or information only as shall be furnished by or on behalf of their respective Governments. They shall be bound to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective Governments in support of or in answer to any claim, and to hear, if required, one person on each side on behalf of each Government on each and every separate claim. Should they fail to agree in opinion upon any individual claim, they shall call to their assistance the umpire whom they may have agreed to name, or who may be determined by lot, as the case may be; and such umpire, after having examined the evidence adduced for and against the claim, and after having heard, if required, one person on each side, as aforesaid, and consulted with the Commissioners, shall decide thereupon finally and without appeal. The decision of the Commissioners and of the umpire shall be given upon each claim in writing, shall designate whether any sum which may be allowed shall be payable in gold or in the currency of the United States, and shall be signed by them, respectively. It shall be competent for each Government to name one person to attend the Commissioners as agent on its behalf, to present and support claims on its behalf, and to answer claims

made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

The President of the United States of America and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the Commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever.

It is agreed that no claim arising out of a transaction of a date prior to the 2d of February, 1848, shall be admissible under this convention.

ARTICLE III.

Every claim shall be presented to the Commissioners within eight months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the Commissioners, or of the umpire in the event of the Commissioners differing in opinion thereupon, and then and in any such case the period for presenting the claim may be extended to any time not exceeding three months longer.

The Commissioners shall be bound to examine and decide upon every claim within two years and six months from the day of their first meeting. It shall be competent for the Commissioners conjointly, or for the umpire if they differ, to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this convention.

ARTICLE IV.

When decisions shall have been made by the Commissioners and the arbiter in every case which shall have been laid before them, the total amount awarded in all the cases decided in favor of the citizens of the one party shall be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of three hundred thousand dollars, shall be paid at the city of Mexico, or at the city of Washington, in gold or its equivalent, within twelve months from the close of the Commission, to the Government in favor of whose citizens the greater amount may have been awarded, without interest or any other deduction than that specified in Article VI of this convention. The residue of

the said balance shall be paid in annual installments to an amount not exceeding three hundred thousand dollars, in gold or its equivalent, in any one year, until the whole shall have been paid.

ARTICLE V.

The high contracting parties agree to consider the result of the proceedings of this Commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said Commission, shall, from and after the conclusion of the proceedings of the said Commission, be considered and treated as finally settled, barred, and thenceforth inadmissible.

ARTICLE VI.

The Commissioners and the umpire shall keep an accurate record and correct minutes of their proceedings, with the dates. For that purpose they shall appoint two secretaries versed in the language of both countries to assist them in the transaction of the business of the Commission. Each Government shall pay to its Commissioner an amount of salary not exceeding forty-five hundred dollars a year in the currency of the United States, which amount shall be the same for both Governments. The amount of compensation to be paid to the umpire shall be determined by mutual consent at the close of the Commission, but necessary and reasonable advances may be made by each Government upon the joint recommendation of the Commission. The salaries of the secretaries shall not exceed the sum of twenty-five hundred dollars a year in the currency of the United States. The whole expenses of the Commission, including contingent expenses, shall be defrayed by a ratable deduction on the amount of the sums awarded by the Commission, provided always that such deduction shall not exceed five per cent. on the sums so awarded. The deficiency, if any, shall be defrayed in moieties by the two Governments.

ARTICLE VII.

The present convention shall be ratified by the President of the United States, by and with the consent of the Senate thereof, and